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THE IMPLIED WAIVER SOLUTION TO THE PROBLEM OF PRIVILEGE IN THE INDIVIDUAL BANKRUPTCY CASE

*Laura B. Bartell**

When a debtor voluntarily enters the realm of bankruptcy it is commencing a civil action¹ seeking the adjustment of its prepetition obligations either through liquidation of assets² or through financial reorganization.³ As in any civil action in federal court, the Federal Rules of Evidence are applicable to bankruptcy cases.⁴ Included within those Federal Rules of Evidence is Rule 501, which directs that “privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁵

* Associate Professor of Law at Wayne State University Law School. This Article grew out of my participation in the 2002 Bankruptcy Institute sponsored by the Minnesota State Bar Association and its Bankruptcy Section. My thanks to Judge Nancy C. Dreher for turning my thoughts to privilege in connection with that program.

¹ Bankruptcy Form 1 is in the form of a voluntary petition for “relief in accordance with the chapter of title 11, United States Code, specified in th[e] petition.” OFFICIAL BANKR. FORM 1 (2002). The petition is filed with the clerk of the bankruptcy court, FED. R. BANKR. P. 1002(a), together with the applicable filing fee. 28 U.S.C. § 1930 (2000). The clerk docket the petition, creating a civil case within the original and exclusive jurisdiction of the federal district court. *Id.* § 1334(a). The case is then referred to the bankruptcy judges for the district pursuant to standing rule of the applicable district court. *Id.* § 157(a).

² Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-784 (2003). In this Article all references to the Code refer to the Bankruptcy Code. *Id.*

³ Chapters 9, 11, 12, and 13 of the Bankruptcy Code, *Id.* §§ 901-945, 1101-1174, 1201-1231, 1301-1330. Editor’s note: As of the publication date of this Journal renewal of chapter 12 was still being debated in the United States Senate. This section expired on January 1, 2004.

⁴ FED. R. BANKR. P. 9017.

⁵ Federal Rule of Evidence 501 provides in full:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the

Application of privilege in bankruptcy cases has demanded a great deal of "reason and experience." Looking in particular at the attorney-client privilege, once the debtor is in bankruptcy the number of variables bearing on assertion or waiver of the debtor's privilege multiply. Allegedly privileged communications may have taken place pre-bankruptcy or post-bankruptcy. The debtor may have filed for chapter 7 liquidation, or may be seeking adjustment of its debts under another chapter of the Bankruptcy Code. The debtor may be an individual, or alternatively may be a legal entity, such as a corporation or partnership, which has its own management structure (e.g., Board of Directors, general partner, officers), through which it has communicated with counsel both before and after the bankruptcy petition was filed. Additionally, as a part of the bankruptcy process, the debtor may be represented for certain purposes by a trustee or an examiner or by the debtor in possession, whose interests in the allegedly privileged communications of the debtor may diverge from those of the debtor itself or of those who own the debtor's equity or managed its affairs before the case commenced. With all of these disparate factors coming into play, it is not surprising that courts have struggled to determine when the privilege applies and who has the right to assert or waive it in a bankruptcy proceeding.

In *Commodity Futures Trading Commission v. Weintraub*,⁶ the Supreme Court concluded that in a chapter 7 case commenced by a corporate debtor, the trustee in bankruptcy has the power to assert or waive the attorney-client privilege with respect to prepetition communications between counsel for the corporation and its management.⁷ Since *Weintraub*, courts have confidently extended its holding to corporate chapter 11 cases,⁸ as well as corporate cases converted from chapter 11 to chapter 7.⁹ Because the Supreme Court in *Weintraub* expressly stated that the rationale for its holding

privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

⁶ 471 U.S. 343, 358 (1985).

⁷ *Id.*

⁸ See, e.g., *In re Cumberland Inv. Corp.*, 120 B.R. 627, 628 (Bankr. D.R.I. 1990); cf. *Am. Metrocomm Corp. v. Duane Morris & Heckscher L.L.P. (In re Am. Metrocomm Corp.)*, 274 B.R. 641, 654 (Bankr. D. Del. 2002) (holding that chapter 11 debtor in possession controls attorney-client privilege with respect to prepetition and postpetition communications).

⁹ See *In re Manshul Constr. Corp.*, 228 B.R. 532, 542 (Bankr. S.D.N.Y. 1999).

was inapplicable to individual (as opposed to corporate) bankruptcies,¹⁰ courts have divided on whether the trustee in bankruptcy controls the privilege of an individual debtor in a chapter 7 bankruptcy.¹¹

This Article suggests that the Supreme Court in *Weintraub*, as well as all lower courts seeking to interpret its holding since that decision, have been asking the wrong question. Instead of trying to determine whether the trustee in bankruptcy has succeeded to the pre-bankruptcy attorney-client privilege of the debtor in a chapter 7 case or whether the debtor still retains it, the courts should have been asking whether anyone still had the privilege with respect to the communications sought to be protected. The doctrine of implied waiver of privilege, examined in the context of bankruptcy policy, may lead to the conclusion that a debtor who voluntarily seeks relief under the Bankruptcy Code implicitly waives his attorney-client privilege to the extent that the allegedly privileged communications bear on his financial condition.

Part I reviews the cases leading up to *Weintraub* and the analysis of the Supreme Court in *Weintraub* with respect to corporate chapter 7 bankruptcies. Part II looks at the post-*Weintraub* landscape, and considers the theories that have been proposed to justify the bankruptcy trustee's control of an individual debtor's privilege. Part III turns to the doctrine of implied waiver of privilege as it has been applied both outside the bankruptcy context and in a limited way by bankruptcy courts. Part IV concludes by asserting that the implied waiver doctrine may "solve" the problem of determining who may assert or waive the privilege in many individual chapter 7 bankruptcy cases, because by seeking bankruptcy relief, the debtor implicitly waives the privilege with respect to those confidential communications essential to resolution

¹⁰ 471 U.S. at 356-57.

¹¹ Compare *McClarty v. Gudenau*, 166 B.R. 101, 102 (Bankr. E.D. Mich. 1994), and *In re Hunt*, 153 B.R. 445, 451-52 (Bankr. N.D. Tex. 1992) (holding the trustee may not waive privilege), with *In re Foster*, 217 B.R. 631, 635 (Bankr. D. Colo. 1997), *rev'd*, 188 F.3d 1259 (10th Cir. 1999) (concluding that when the estate is the owner of assets consisting of prepetition causes of action against third parties, the trustee has right to assert or waive privilege with respect to those causes of action), and *Whyte v. Williams (In re Williams)*, 152 B.R. 123, 129 (Bankr. N.D. Tex. 1992) (finding that the liquidating trustee who succeeded to avoidance causes of action also succeeds to control over evidentiary privileges in connection with those causes of action).

of the bankruptcy case. Therefore, there is no privilege remaining for the debtor or the trustee to assert or waive.

I. WEINTRAUB AND THE MANAGEMENT THEORY

Before the Supreme Court provided guidance on the issue, the lower courts were divided on whether the trustee for a corporate chapter 7 debtor had the right to waive the attorney-client privilege with respect to prepetition communications between the corporation's counsel and its officers and directors. The Eighth Circuit in *Citibank, N.A. v. Andros*,¹² in reversing a decision of the District Court,¹³ concluded that the trustee in bankruptcy may waive the privilege.¹⁴ The Second Circuit reached the same conclusion in *In re O.P.M. Leasing Services, Inc.*¹⁵ under circumstances where both directors and officers of the debtor corporation had resigned. When an examiner was appointed with expanded powers comparable to those exercised by a trustee, the Ninth Circuit in *In re Boileau*¹⁶ concluded that the examiner had the right to waive the privilege.

By contrast, the Seventh Circuit in *Commodity Futures Trading Commission v. Weintraub*¹⁷ distinguished *O.P.M. Leasing* and, expressly rejecting the conclusion of *Andros*,¹⁸ concluded that the trustee in bankruptcy does not have the power to waive the privilege.¹⁹

However, even those courts that found the trustee could waive the corporate debtor's privilege divided on the theory on which they reached that conclusion. Some courts looked at the functions of the trustee, analogizing them to the rights and powers exercised by

¹² 666 F.2d 1192 (8th Cir. 1981).

¹³ *In re Hy-Gain Elecs. Corp.*, 11 B.R. 119 (Bankr. D. Neb. 1978), *rev'd*, 666 F.2d 1192 (8th Cir. 1981).

¹⁴ *Andros*, 666 F.2d at 1195-96.

¹⁵ 670 F.2d 383, 387 (2d Cir. 1982).

¹⁶ 736 F.2d 503, 506 (9th Cir. 1984) (deciding a chapter 11 case).

¹⁷ 722 F.2d 338 (7th Cir. 1984), *rev'd*, 471 U.S. 343 (1985).

¹⁸ *Id.* at 341-42.

¹⁹ *Id.* at 343; *see also* Hudtwalker v. Van Nostrand & Martin (*In re Vantage Petroleum Corp.*), 40 B.R. 34, 40 (Bankr. E.D.N.Y. 1984) (adopting the reasoning of *Weintraub*); Ross v. Popper, 9 B.R. 485, 487 (Bankr. S.D.N.Y. 1980) ("[T]he only proper person to decide whether there should be a waiver of attorney-client privilege . . . is the bankrupt corporation itself, by its authorized officer or officers."); *In re Hy-Gain Elecs. Corp.*, 11 B.R. 119, 120 (Bankr. D. Neb. 1978) (finding that trustee may not waive privilege because privilege is not "property" which passes to trustee).

management of a solvent corporation which included the right to waive the privilege (the "management theory").²⁰ Others saw the attorney-client privilege of a corporation merely as one type of property interest or asset that passes by operation of the bankruptcy laws to the trustee upon a filing (the "property theory").²¹ In *Andros*, the court seemed to use both theories, first noting that the power to waive the privilege "belongs to management, not the individual officers of the corporation,"²² and then adding that the "privilege passes with the property of the corporate debtor to the trustee."²³ Other courts were equally obscure as to the theory of their holdings.²⁴

The facts of *Weintraub* made it a favorable vehicle for Supreme Court resolution.²⁵ The debtor Chicago Discount Commodity Brokers, Inc. (CDCB) became the subject of an investigation by the

²⁰ See, e.g., *In re Cont'l Mortgage Investors*, No. 76-593-S (D. Mass. July 31, 1979) (authorizing waiver in an unpublished Chapter X case decided under Bankruptcy Act); *In re Blier Cedar Co.*, 10 B.R. 993, 997 n.5 (Bankr. D. Me. 1981) (noting that rights and powers of the corporation belong to the trustee); *Weck v. Dist. Court*, 161 Colo. 384, 388, 422 P.2d 46, 48 (1967) (allowing trustee to waive its statutory accountant-client privilege); cf. *In re Boileau*, 736 F.2d 503, 506 (9th Cir. 1984) (finding that examiner with expanded powers normally carried out by trustee had power to waive attorney-client privilege).

²¹ See, e.g., *In re O.P.M. Leasing Servs., Inc.*, 13 B.R. 64, 67 (Bankr. S.D.N.Y. 1981), *aff'd on other grounds*, 670 F.2d 383 (2d Cir. 1982); *In re Inv. Bankers, Inc.*, 30 B.R. 883, 886 (Bankr. D. Colo. 1983); *In re Amjoe, Inc.*, Bankr. L. Rep. (CCH) ¶ 66,131 (M.D. Fla. Oct. 12, 1976).

²² *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981).

²³ *Id.* The Seventh Circuit in *Weintraub* interpreted *Andros* as endorsing the property theory. *Commodity Futures Trading Comm'n v. Weintraub*, 722 F.2d 338, 342 (7th Cir. 1984), *rev'd*, 471 U.S. 343 (1985).

²⁴ See, e.g., *In re O.P.M. Leasing Servs. Inc.*, 670 F.2d at 386 (relying on some sort of doctrine of necessity in the absence of a board of directors); *In re Nat'l Trade Corp.*, 28 B.R. 872, 874 (Bankr. N.D. Ill. 1983) ("[S]ince the Bankruptcy Act vests broad authority to manage the affairs of corporate debtor in its trustee, the corporation's attorney-client privilege passes with the property of the debtor's estate to the trustee."); *In re Silvio De Lindegg Ocean Dev. of Am., Inc.*, 27 B.R. 28 (Bankr. S.D. Fla. 1982) (noting the power of trustee to waive privilege "is clear," citing *Andros*, 666 F.2d 1192); *In re Featherworks Corp.*, 25 B.R. 634, 643 (Bankr. E.D.N.Y. 1982), *aff'd*, 36 B.R. 460 (E.D.N.Y. 1984) (holding the privilege "passes by operation of law to the trustee in bankruptcy," citing *Andros*, 666 F.2d 1192) (dictum); *In re Smith*, 24 B.R. 3, 4 (Bankr. S.D. Fla. 1982) (citing both the district court opinion in *O.P.M. Leasing* which relied on the property theory, and *Andros*, which used both theories); *In re Kaleidoscope, Inc.*, 15 B.R. 232, 239-40 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (Bankr. N.D. Ga. 1982) (noting that trustee "succeeds to the rights and powers of the Debtor with regard to the attorney/client relationship that existed between the debtor and its pre-bankruptcy counsel.").

²⁵ All of the facts that follow come from the Brief for the Commodity Futures Trading Commission. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261).

Commodity Futures Trading Commission (CFTC) for alleged violations of the Commodity Exchange Act,²⁶ which eventually led to the filing of a complaint. At the time the complaint was filed, Frank McGhee was the sole director and officer of CDCB, as the two other directors and officers had resigned. Frank McGhee entered into a consent decree with the CFTC pursuant to which all assets of the brokerage house were frozen and a receiver, John K. Notz, Jr., was appointed for the purpose of filing a petition for liquidation under chapter 7 of the Bankruptcy Code.

After receiver Notz filed a voluntary petition under chapter 7, he was appointed trustee in bankruptcy for the debtor. Thereafter, the CFTC, pursuing its formal investigation under the Commodity Exchange Act, sought to depose Gary Weintraub, former counsel to CDCB, with respect to suspected fraud by CDCB's officers and employees. Weintraub answered some questions, but declined to answer others, invoking the attorney-client privilege of the debtor. The CFTC then asked trustee Notz to waive the debtor's attorney-client privilege with respect to communications occurring prior to his appointment as receiver. After the trustee purported to do so, Weintraub was ordered to answer. Weintraub appealed, and the district court affirmed. After Frank McGhee and one of the former directors and officers, Andrew McGhee, intervened, the district court modified its order, but reaffirmed that Weintraub had no authority to assert the privilege on behalf of CDCB. The McGhee's appealed to the Seventh Circuit, and the court of appeals reversed.²⁷ The Supreme Court granted certiorari to resolve the conflict between the Seventh Circuit holding and the decisions by the Second and Eighth Circuits that had allowed waiver by the trustee.

From the standpoint of those seeking reversal of the Seventh Circuit, the case was ideal. The party-in-interest seeking to support the trustee's right to waive the privilege was not the trustee but a government agency charged with protecting investors, represented by the Department of Justice. Although the trustee, John Notz, supported the position of the government as *amicus curiae*, the involvement of the Department equated the position of the petitioner with the public interest. On the other hand, by the time the case came before the Supreme Court, one of the respondents,

²⁶ 7 U.S.C. § 1 (2000).

²⁷ *Weintraub*, 722 F.2d at 343.

Frank McGhee, had been convicted of embezzling customer funds and sentenced to three years in jail,²⁸ and the other had a substantial civil judgment entered against him.²⁹

The decision of the Supreme Court reversing the Seventh Circuit was unanimous with Justice Powell not participating. While recognizing the importance of the attorney-client privilege in "promoting full and frank communications between attorneys and their clients,"³⁰ the Supreme Court noted that application of the privilege to corporations "presents special problems."³¹ In particular, only living, breathing individuals can have privileged communications with counsel on behalf of the corporation, and only living, breathing individuals can waive the privilege with respect to those communications. The identity of those communicating and waiving individuals does not necessarily coincide. In *Upjohn Co. v. United States*,³² the Court concluded that communications between counsel for the corporation and lower-level employees (not merely those who constituted the "control group") could be protected by the privilege.³³ The parties in *Weintraub* agreed that the power to waive a solvent corporation's attorney-client privilege rests exclusively with its management (i.e., its directors and officers). The parties also agreed that if new management assumed control of a solvent corporation, for example because of a takeover, the power to waive the privilege passed to the new directors and officers.³⁴

Dismissing respondents' argument that the Bankruptcy Code itself recognized the ability of debtor's management to assert the privilege against the trustee,³⁵ the Court cited *Butner v. United States*³⁶

²⁸ Although Andrew McGhee was also a respondent, the Supreme Court quickly concluded that, as a former director and officer, Andrew had no control over the privilege of CDCB after his resignation and therefore that Frank McGhee was the only party who could compete with the trustee for such control. 471 U.S. at 349 n.5.

²⁹ Brief of Respondents Frank H. McGhee and Andrew McGhee at 9 n.8, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261).

³⁰ *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

³¹ *Id.*

³² 449 U.S. 383 (1981).

³³ *Id.* at 395.

³⁴ *Weintraub*, 471 U.S. at 349.

³⁵ Respondents argued that the language of § 542(e) of the Code supported their argument. *Id.* at 351. Section 542(e) allows the court to order an attorney holding "recorded information . . . relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee," but only "[s]ubject to any applicable privilege." 11 U.S.C.

for the proposition that waiver of privilege in a bankruptcy case should be governed to the extent possible by the same principles that govern waiver outside of bankruptcy.³⁷ Because management of a solvent corporation concededly controlled the privilege, the Court compared the role of the trustee in bankruptcy with that of the officers and directors of a debtor corporation to determine which more closely resembled that of management.³⁸ Noting the broad powers and duties conferred on the trustee by the provisions of the Code,³⁹ and the effective ouster of the debtor's directors from operation of the debtor's business,⁴⁰ the Court concluded that "the trustee plays the role most closely analogous to that of a solvent corporation's management."⁴¹ Finding no bankruptcy policies would be undermined by affording the trustee the management function of waiving the attorney-client privilege,⁴² the Court concluded that the trustee of a bankrupt corporation has the power to waive the corporation's privilege with respect to prepetition communications with counsel.⁴³

Although the trustee Notz,⁴⁴ (less directly, the CFTC)⁴⁵ had argued the "property" theory to the Court to support their position

§ 542(c) (2003). The Court interpreted the "subject to" clause as "an invitation for judicial determination of privilege questions." *Weintraub*, 471 U.S. at 351.

³⁶ 440 U.S. 48 (1979).

³⁷ *Weintraub*, 471 U.S. at 351-52; see also William R. Mitchelson, Jr., Comment, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV. 1230, 1241-46 (1984).

³⁸ *Weintraub*, 471 U.S. at 351-52.

³⁹ See, e.g., 11 U.S.C. §§ 704, 721, 1106, 1108.

⁴⁰ *Weintraub*, 471 U.S. at 353.

⁴¹ *Id.*

⁴² Indeed, the Supreme Court concluded that if debtor's directors retained the power to assert or waive the privilege, the trustee's statutory function of investigating and pursuing causes of action against the debtor's officers and directors could be frustrated. *Id.*

In response to respondents' contention that its decision would create a disincentive for corporations to seek the protection of bankruptcy, the Court noted that "[t]he law creates numerous incentives, both for and against the filing of bankruptcy petitions" and if its decision created such a disincentive it was not an improper one. *Id.* at 357-58.

⁴³ *Id.* at 358.

⁴⁴ See Brief of John K. Notz, Jr., Trustee, as Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 6, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261) ("[T]he right to control the attorney-client privilege is an asset of the corporation, not an asset of the particular officers or directors of the corporation. In bankruptcy the corporation's assets are transferred to the estate, and the control of the attorney-client privilege should belong with the Trustee as the representative of the estate.").

⁴⁵ The CFTC premised its argument to the Court on the "management" theory. Brief of

that the trustee had the right to waive the privilege,⁴⁶ the Supreme Court never addressed it, instead grounding its holding in the “management” theory. In rejecting respondents’ argument that a decision permitting waiver by the trustee would be applicable to individual debtors as well as corporations, the Court expressly stated that “our holding today has no bearing on the problem of individual bankruptcy” because “there is no ‘management’ that controls a solvent individual’s attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case.”⁴⁷

II. POST-WEINTRAUB THEORIES

The Supreme Court resolved one issue very clearly in *Weintraub*—the trustee for a chapter 7 corporate debtor has the right to waive the attorney-client privilege of the debtor with respect to prepetition communications.⁴⁸ The Court’s rationale was quickly extended to trustees for corporate debtors in other types of insolvency cases, such as chapter 11 trustees⁴⁹ and the liquidation trustee in a proceeding under the Securities Investor Protection Act of 1970.⁵⁰ The “management” theory was also found applicable to the chapter 7 trustee for a partnership debtor because a partnership, like a corporation, can act only through agents.⁵¹

the Commodity Futures Trading Comm’n, at 8-9, *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261). However, the CFTC invited the Court to apply the “property” theory if it wished to do so. *Id.* at 22 n.38 (“Alternatively, the Court could conclude that the trustee may assert or waive the attorney-client privilege because the power to do so is an intangible asset that passes to the trustee under the Bankruptcy Code.”).

⁴⁶ Respondents essentially relegated their response to the property theory to a single paragraph, arguing that, “[l]ike civil and constitutional rights, evidentiary privileges are simply not property rights.” Brief of Respondents Frank H. McGhee and Andrew McGhee at 20, *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261).

⁴⁷ *Weintraub*, 471 U.S. at 356-57.

⁴⁸ See, e.g., *Schaeffer v. Wagner*, 765 F.2d 133, 134 (10th Cir. 1985); *Gottlieb v. Wiles*, 143 F.R.D. 241, 246 n.10 (D. Colo. 1992); *In re Manshul Constr. Corp.*, 228 B.R. 532, 542 (Bankr. S.D.N.Y. 1999); *In re Madison Mgmt. Group, Inc.*, 212 B.R. 894, 897 (Bankr. N.D. Ill. 1997).

⁴⁹ See, e.g., *In re Cumberland Inv. Corp.*, 120 B.R. 627, 628 (Bankr. D.R.I. 1990); cf. *In re Jaeger*, 213 B.R. 578, 592 (Bankr. C.D. Cal. 1997) (holding that chapter 11 trustee succeeds to right of corporation to raise conflict of interest claim of debtor’s former counsel).

⁵⁰ See *Secs. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 434-35 (Bankr. S.D.N.Y. 1997); cf. *Maleski v. Corp. Life Ins. Co.*, 641 A.2d 1, 4 (Pa. Commw. Ct. 1994) (holding that statutory liquidator of insurance company may waive privilege of company).

⁵¹ See *United States v. Campbell*, 73 F.3d 44, 47 (5th Cir. 1996).

However, in view of the Supreme Court's express statement that its "management" theory was inapplicable to the individual (as opposed to corporate) bankruptcy,⁵² lower courts and commentators have struggled with the issue of who controls the attorney-client privilege of an individual debtor in a chapter 7 bankruptcy after *Weintraub*.⁵³

⁵² *Weintraub*, 471 U.S. at 356-57.

⁵³ If an individual files for protection under chapter 11 and continues to function as debtor in possession, presumably he or she would continue to control the privilege with respect to prepetition communications, just as management of a corporate debtor in chapter 11 controls the privilege as long as the corporation functions as debtor in possession. See, e.g., *In re Am. Metrocomm Corp.*, 274 B.R. 641, 653 (Bankr. D. Del. 2002); *Ramette v. Bame* (*In re Bame*), 251 B.R. 367, 373 (Bankr. D. Minn. 2000); *Whyte v. Williams* (*In re Williams*), 152 B.R. 123, 127 (Bankr. N.D. Tex. 1992). Although the conclusion seems self-evident, the analysis is not. Does the individual debtor in a chapter 11 case possess the right to assert or waive the privilege *as debtor in possession* because he or she has the rights and performs all functions and duties of the trustee under § 1107(a) and the trustee would have that right, or does the individual debtor have that right *as debtor* because it would never pass to the trustee (and therefore is not included in the rights of the debtor in possession under § 107(a))?

The rationale is unimportant so long as the individual debtor acts as debtor in possession, but becomes critical if a chapter 11 trustee is appointed or the case is converted to chapter 7. If the chapter 11 individual debtor was exercising control over the privilege as debtor in possession pursuant to § 1107(a), presumably the chapter 11 or chapter 7 trustee succeeds to the same powers. The bankruptcy court so implied in *Williams*, where all avoidance causes of action were transferred to a liquidating trust pursuant to the plan of reorganization of an individual chapter 11 debtor, and the court held that the liquidating trustee succeeded to the debtor in possession's fiduciary responsibility with respect to the privilege. *In re Williams*, 152 B.R. at 129.

If, however, the individual debtor acting as debtor in possession never had the right to assert or waive the privilege because that power remained with the individual debtor, the result may be different. The issue is the same as that posed when the individual debtor files under chapter 7, and therefore will be considered further in that context.

With respect to postpetition communications with counsel, an individual chapter 11 debtor may be communicating either as debtor in possession or as debtor. To the extent communications are made in his or her capacity as debtor in possession, the right to waive the privilege with respect to those communications should pass to a subsequently-appointed trustee for the estate. The bankruptcy court so held in *Bame*. *In re Bame*, 251 B.R. at 374-75. If the communication is made by the debtor *qua* debtor, the ability of a trustee to waive the privilege again depends on whether a trustee ever succeeds to the individual debtor's privilege; the timing of the privileged communications should not matter if the communications are in fact made by the debtor in his or her individual rather than fiduciary capacity.

The position of a chapter 13 trustee is more problematic. The chapter 13 trustee performs all duties performed by the chapter 7 trustee specified in § 704 with the exception of the duty to liquidate estate property and the duty to file reports and summaries of the operation of the debtor's business. 11 U.S.C. § 1302(b)(1) (2003). See, e.g., *Tower Loan of Miss., Inc. v. Maddox* (*In re Maddox*), 15 F.3d 1347, 1355 (5th Cir. 1994) (finding that chapter 13 trustee has a "broad array of powers and duties" and, with respect to the obligation of collecting and paying, "role of the chapter 13 trustee . . . is virtually identical to the one played

Some courts have simply rejected the notion that the trustee for an individual debtor controls the privilege on any theory.⁵⁴ The policy grounds for their conclusion are the same proffered by courts prior to *Weintraub*. First, they emphasize the differing expectations of the parties; whereas corporate management would not anticipate that it could retain control over the corporation's privilege in the

by the chapter 7 trustee. . . ."); *In re Colandrea*, 17 B.R. 568, 581 (Bankr. D. Md. 1982) ("With the exception of the duty to reduce the estate to money, a Chapter 13 Trustee has substantially all the duties of a Chapter 7 Trustee."). Therefore, one could argue that the chapter 13 trustee should have the same ability to assert or waive the privilege of an individual debtor that a chapter 7 trustee has. However, if the chapter 13 debtor is engaged in business, 11 U.S.C. § 1304(b) gives the debtor—not the trustee—the right to operate the business and exercise the powers of the trustee under § 363(c) (transactions in the ordinary course of business) and § 364 (obtaining credit) to the exclusion of the trustee. 11 U.S.C. 363(c), 364, 1304(b). Under the "management" theory discussed in Part II.A., such a chapter 13 debtor might be distinguished from one not engaged in business who does not exercise "management" functions. See *infra* Part II.A. In addition, the chapter 13 trustee does not take possession of the debtor's property as does a chapter 7 trustee. See 11 U.S.C. § 1306(b). Therefore, if one were embracing the "property" theory discussed in Part II.B., arguably the chapter 13 trustee would not succeed to the privilege of the debtor even though the chapter 7 trustee would. See *infra* Part II.B. There are no reported cases in which a chapter 13 trustee sought to exercise control over the debtor's attorney-client privilege.

⁵⁴ See, e.g., *In re Jaeger*, 213 B.R. 578, 592-93 (Bankr. C.D. Cal. 1997) (holding the chapter 11 trustee for individual debtor has no standing to raise conflict of interest claim with respect to debtor's prepetition counsel); cf. *DeMassa v. MacIntyre* (*In re MacIntyre*), 79 F.3d 1153, 1996 WL 102577, at *6 (9th Cir. Mar. 6, 1996) (declining to decide the issue because neither chapter 7 trustee nor individual debtors had purported to waive privilege); *McClarty v. Gudenuau*, 166 B.R. 101, 102 (Bankr. E.D. Mich. 1994); *In re McVay*, 169 B.R. 49, 51 (Bankr. W.D. Tenn. 1994) (finding *Weintraub* inapposite to individual chapter 7 case where debtor was attorney and privilege was asserted by current counsel to non-debtor clients); *In re Hunt*, 153 B.R. 445, 451-52 (Bankr. N.D. Tex. 1992). See Neil E. Herman, Note, *Who Controls the Attorney-Client Privilege in Bankruptcy?*, 13 HOFSTRA L. REV. 549, 584 (1985) ("[A]ll courts should decline the *Weintraub* Court's invitation to address to some theory which would divest the individual of his attorney-client privilege" because "the chilling effect is potentially substantial."); Julianna M. Thomas, Note, *Fifteen Years After Weintraub: Who Controls the Individual's Attorney-Client Privilege in Bankruptcy?*, 80 B.U. L. REV. 635, 672-80 (2000) (finding that interests underlying attorney-client privilege and policies behind Code demonstrate need for individual debtor to retain privilege in bankruptcy). See generally Jan L. Bansch, Note, *The Trustee's Choice? The Ability of the Trustee to Waive a Corporation's Attorney-Client Privilege in a Corporate Bankruptcy*, 37 DRAKE L. REV. 129 (1987/1988) (arguing that even a corporate debtor should retain its privilege in bankruptcy).

The case of *In re Tippy Togs of Miami, Inc.*, 237 B.R. 236 (Bankr. S.D. Fla. 1999), is sometimes cited for the proposition that the trustee can never waive the privilege on behalf of an individual debtor. See, e.g., *Ramette v. Bame* (*In re Bame*), 251 B.R. 367, 376 (Bankr. D. Minn. 2000); *French v. Miller* (*In re Miller*), 247 B.R. 704, 709 (Bankr. N.D. Ohio 2000). However, the court in *In re Tippy Togs of Miami, Inc.* merely held that the communications at issue were not communications of the corporate chapter 7 debtor but were instead privileged communications of the debtor's president in his individual capacity and therefore were not covered by the debtor's attorney-client privilege.

event of a change in control of the corporation, an individual expects to keep control over his privilege unless it is waived or used in connection with a crime or fraud.⁵⁵ Second, they express concern that the instrumental goals of the attorney-client privilege—encouraging “full and frank communications between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice”⁵⁶—would be undermined if clients believed they would lose the protection of the privilege if they find themselves in bankruptcy.⁵⁷ Finally, these courts place great emphasis on the privacy concerns of the individual debtors, seeing the privilege as a personal attribute that is not sacrificed by financial hardship.⁵⁸

Those courts and commentators that have concluded that the trustee has the power to waive an individual debtor's privilege do not agree on a theory justifying that conclusion. This confusion leads to a logical question: Is there a persuasive theory under which the bankruptcy trustee has the power to waive the attorney-client privilege of an individual debtor?

A. “Management” Theory Revisited

In endorsing the “management” theory for corporate debtors, the Supreme Court in *Weintraub* compared the role of the bankruptcy trustee to the role of corporate management outside of bankruptcy, finding the analogy compelling.⁵⁹ The Court went on to state that individuals have no management outside of bankruptcy and therefore the trustee cannot succeed to management's privileges as it can in the corporate case.⁶⁰ While the observation of the Court with respect to non-bankrupt individuals is unassailable, its conclusion is not.

It is true that outside of bankruptcy, unless individuals are incompetent to do so, they generally act for themselves with respect

⁵⁵ See, e.g., *McClarty*, 166 B.R. at 102; *Hunt*, 153 B.R. at 452.

⁵⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁵⁷ See, e.g., *Yaquinto v. Touchstone, Bernays, Johnston, Beall & Smith, L.L.P.*, 1999 WL 354228, at *2 (N.D. Tex. June 1, 1999); *McClarty*, 166 B.R. at 102; *Hunt*, 153 B.R. at 452.

⁵⁸ Quoting Professor Jay Westbrook, the court in *Hunt* notes, “an individual does not forfeit his soul merely because he files a bankruptcy petition.” *Hunt*, 153 B.R. at 452 n.12; see also *McClarty*, 166 B.R. at 102.

⁵⁹ *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985).

⁶⁰ *Id.* at 356-57.

to assertion or waiver of the privilege. Outside of bankruptcy they also generally act for themselves with respect to control of their books and records, the use, sale, or lease of their property, incurring and paying debts, bringing suit and defending against suits brought by others, and choosing whether to disclose financial information to third parties. Bankruptcy, however, dramatically limits an individual's degree of autonomy over his financial affairs and property.

The commencement of a bankruptcy case creates an "estate" comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case."⁶¹ If there is a trustee appointed, the debtor is required to surrender to the trustee all property of the estate and any records relating thereto.⁶² Any other person holding books and records relating to the debtor's property or financial affairs (including the debtor's lawyer or accountant) may, after notice and a hearing, be ordered to turn them over to the trustee.⁶³

The individual debtor is directed to file a list of creditors and schedules in the prescribed forms,⁶⁴ file a statement of intent with respect to consumer debts secured by property of the estate and perform his intention within the specified time period,⁶⁵ appear at the § 341 meeting,⁶⁶ and generally to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title."⁶⁷

The trustee, on the other hand, may exercise many of the rights and powers belonging to the prepetition debtor. The trustee becomes the legal representative of the estate.⁶⁸ Debts that constitute assets of the estate must be paid to the trustee rather than the debtor,⁶⁹ and most unauthorized postpetition transfers of property of the estate by the debtor are avoidable by the trustee.⁷⁰ Only the trustee (or the debtor in possession exercising the powers

⁶¹ 11 U.S.C. § 541(a)(1) (2003).

⁶² *Id.* § 521(4).

⁶³ *Id.* § 542(e).

⁶⁴ *Id.* § 521(1).

⁶⁵ *Id.* § 521(2).

⁶⁶ *Id.* §§ 343, 521(5).

⁶⁷ *Id.* § 521(3).

⁶⁸ *Id.* § 323(a).

⁶⁹ *Id.* § 542(b).

⁷⁰ *Id.* § 549(a).

of the trustee) is authorized to use, sell, or lease property of the estate,⁷¹ obtain credit or incur debt that will have a claim against the estate assets,⁷² or elect to assume or reject executory contracts or leases.⁷³ The trustee in a chapter 7 case is directed to "collect and reduce to money the property of the estate."⁷⁴ All trustees investigate the financial affairs of the debtor and furnish information about the estate to other parties in interest.⁷⁵

Except with respect to the obligation to file a statement of intent, which is applicable only to individual debtors,⁷⁶ the respective rights and obligations of debtors and trustees are identical whether the debtor entities be individual, corporate, or legal, which prior to bankruptcy acts through "management." If the trustee in a corporate chapter 7 bankruptcy has the power to waive the attorney-client privilege, the trustee in an individual chapter 7 bankruptcy must also have the power. The Supreme Court's dictum in *Weintraub* with respect to individual debtors is logically flawed.

The Court's emphasis on *Butner* required that it first identify who exercises control over the privilege outside of bankruptcy.⁷⁷ In the case of a corporation, that was its management. In the case of an individual, that was generally the individual. Second, the Court looked at what actor in bankruptcy has "duties [that] most closely resemble those of" the non-bankruptcy party controlling the privilege.⁷⁸ Examining the provisions of the Bankruptcy Code, the Court concluded that the trustee had "wide-ranging management authority" over the estate and financial affairs of the corporate debtor that was most closely analogous to the debtor's pre-bankruptcy controller of the privilege (i.e., management).⁷⁹ The identical provisions confer on the trustee the same authority over the estate and financial affairs of the individual debtor; in bankruptcy, the trustee's role is without a doubt most closely analogous to the role of the pre-bankruptcy controller of the

⁷¹ *Id.* § 363.

⁷² *Id.* § 364.

⁷³ *Id.* § 365.

⁷⁴ *Id.* § 704(1).

⁷⁵ *Id.* §§ 704(4), 704(7), 1106(a)(1).

⁷⁶ *Id.* § 521(2).

⁷⁷ *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 351 (1985).

⁷⁸ *Id.* at 351-52.

⁷⁹ *Id.* at 352.

privilege (i.e., the individual).⁸⁰ Finally, the Court considered whether allowing the trustee to exercise control over the privilege “would be inconsistent with policies of the bankruptcy laws.”⁸¹ The Court found no federal (i.e., bankruptcy) policies that would be impaired by its result, and concluded that the contrary rule would allow debtor’s management to frustrate the trustee’s efforts to uncover causes of action against officers and directors.⁸² The same considerations would apply to the individual debtor.

The Supreme Court distinguished the individual debtor bankruptcy case from the corporate case because the corporate debtor “must act through agents” whereas the individual “can act for himself.”⁸³ Although that is true, it has no bearing on the analysis the Supreme Court had just completed. The “management” theory embraced by the Supreme Court focused not on who managed the debtor prior to bankruptcy, but on what entity in bankruptcy exercised analogous management functions over the estate and the debtor’s property. Whether prior to bankruptcy a debtor’s affairs are managed by a board of directors, officers, an agent, a general partner, or by the debtor individually, the management role of the bankruptcy trustee is the same. If one accepts the “management” theory as iterated by the Supreme Court in *Weintraub*, the power of the trustee to assert or waive the privilege should be the same as well, despite the Court’s dictum to the contrary. If that result is socially undesirable, then perhaps the management theory is not a satisfactory rationale for resolving the privilege issue in the corporate context either.

⁸⁰ The respondents made this point to the Court, apparently without effect. See Brief of Respondents Frank H. McGhee and Andrew McGhee at 26-30, *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261). Those that dispute the applicability of the management theory to individual debtors argue that the trustee does not have control over the postpetition activities of the individual debtor comparable to the control exercised by the trustee over the postpetition activities of the corporate debtor. See, e.g., Mitchelson, *supra* note 37, at 571 (describing that the trustee “cannot force the debtor to work, to change jobs, or to do anything the individual debtor does not wish to do”); Chris G. Outlaw, Note, *Corporate Attorney-Client Privilege—Waiver by a Bankruptcy Trustee*, 60 TUL. L. REV. 1307, 1319 (1986) (“An individual . . . can act for himself.”). While this is true, control over activities other than those relating to the property of the estate is irrelevant. And with respect to property of the estate, complete autonomy is vested in the trustee for the individual debtor to the same extent as it is for the corporate debtor.

⁸¹ *Weintraub*, 471 U.S. at 353.

⁸² *Id.*

⁸³ *Id.* at 356.

B. *Property Theory Revisited*

In its brief to the Supreme Court, the CFTC, while arguing primarily that a bankruptcy trustee had management authority over the debtor corporation, also briefly suggested that the power to assert or waive the privilege "is an intangible asset that passes to the trustee under the Bankruptcy Code."⁸⁴ The Supreme Court never addressed this theory.⁸⁵ Nevertheless, it has not been widely adopted and no court since the Supreme Court decision in *Weintraub* has concluded that the attorney-client privilege becomes part of the estate that passes to the bankruptcy trustee for an individual debtor pursuant to § 541 of the Code.⁸⁶

The absence of the "property" theory in post-*Weintraub* decisions is surprising. Congress intended that § 541 be interpreted very broadly.⁸⁷ Unlike section 70a of the Bankruptcy Act,⁸⁸ which excluded from the estate property that was not transferable by the debtor or subject to judicial levy,⁸⁹ § 541 has no limits on the nature of the property included in the estate. Although § 541 does not explicitly include "powers which the bankrupt might have exercised for his own benefit" as did the Bankruptcy Act,⁹⁰ it does include an explicit exclusion for "any power that the debtor may exercise solely for the benefit of an entity other than the debtor,"⁹¹ which lends

⁸⁴ Brief for the Commodity Futures Trading Commission at 22 n.38, *Commodity Futures Trading Comm'n v. Weintraub*, 472 U.S. 343 (1985) (No. 84-261). The same argument was made by the bankruptcy trustee in his role as amicus curiae in the case when the petition for a writ of certiorari was filed. See Brief of John K. Notz, Jr., Trustee, as Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 6, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (No. 84-261) (1984); see also *supra* note 21.

⁸⁵ *But cf.* Herman, *supra* note 54, at 571 (recognizing in the Supreme Court's reliance on *Butner v. United States*—which held that property rights in bankruptcy are to be determined by state law in the absence of an overriding federal interest—a possible acknowledgement that the privilege is to be considered a property right).

⁸⁶ 11 U.S.C. § 541(a)(1) provides that the bankruptcy estate is comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (2003).

⁸⁷ See S. REP. NO. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868 (Section 541 "includes all kinds of property, including tangible or intangible property, causes of action . . . , and all other forms of property currently specified in section 70a of the Bankruptcy Act . . .").

⁸⁸ Bankruptcy Act of 1898, Pub. L. No. 696, 30 Stat. 544, 565.

⁸⁹ *Id.* at § 70(a)(5).

⁹⁰ *Id.* at § 70(a)(3).

⁹¹ 11 U.S.C. § 541(b)(1).

some credence to the argument that other powers (i.e., those the debtor exercises for his own benefit) are included in the estate.

Even if the privilege could not be characterized as “property” itself, § 541 sweeps into the estate not only property but also the “legal or equitable interests of the debtor in property”⁹² which could be viewed as embracing the privilege to the extent it constitutes an “interest” in other types of property. For example, property of the estate includes any prepetition cause of action that the debtor had against third parties. The ability of the debtor to assert or waive the privilege with respect to that cause of action could be characterized as an “interest of the debtor” in the property represented by that cause of action. When the trustee (or any other person, such as an assignee or liquidating trustee pursuant to a plan of reorganization) becomes the holder of the cause of action, the trustee (or such other person) also becomes the holder of the privilege insofar as the privilege affects the pursuit of that cause of action. In other words, the privilege runs with the underlying claim as an “interest” in property of the debtor. This theory could be extended to any other type of property of the debtor, allowing the holder of the property to assert or waive the privilege with respect to communications relating to that particular property.

An example of a case whose facts are consistent with this analysis (although its language did not explicitly adopt it) is *In re Ingram*.⁹³ There the debtor was the defendant in a prepetition personal injury case caused by a motor vehicle accident. Debtor was defended by counsel provided by debtor’s insurance company. That counsel turned down a settlement offer, and debtor suffered a large judgment against him, precipitating the bankruptcy. The trustee initiated an adversary proceeding against the insurance company for bad faith defense of the debtor and sought counsel’s files. Under these facts, the bankruptcy court found that the privilege belongs to the estate as repository of the claims, and the privilege can therefore be waived by the trustee.⁹⁴ Similar cases have

⁹² *Id.* at § 541 (a) (1).

⁹³ No. Civ. A. 98-05909-W, 1999 WL 33486089 (Bankr. D.S.C. Apr. 15, 1999).

⁹⁴ *Id.* at *5-6; see also *In re Foster*, 217 B.R. 631, 635 (Bankr. D. Colo. 1997), *rev’d*, 188 F.3d 1259 (10th Cir. 1999) (holding that when estate is owner of assets consisting of prepetition causes of action against third parties, trustee has the right to assert or waive privilege with respect to those causes of action); *Whyte v. Williams* (*In re Williams*), 152 B.R. 123, 129 (Bankr. N.D. Tex. 1992) (liquidating trustee who succeeded to avoidance causes of action also succeeds to control over evidentiary privileges in connection with those causes of

allowed tort creditors, as assignees of the rights of an insured debtor against its insurer, to waive any privilege asserted by the insurer with respect to communications between the lawyer representing the insured and the insurer.⁹⁵

However, the property theory remains controversial. There are two bases for criticism. First, courts seem to find something almost morally repugnant in the characterization of the attorney-client privilege as some sort of "alienable commodity,"⁹⁶ and commentators uniformly agree.⁹⁷ Second, it can be argued that even if the privilege is capable of transfer, it is a personal privilege, connected to a person rather than to property, and its transfer should never happen other than by consent (express or implied).

The first of these critiques seems unjustifiable. It is true that if the privilege could not be transferred outside of bankruptcy, consistent with the Supreme Court's touchstone of *Butner*,⁹⁸ it should not be transferable to the trustee in bankruptcy. Yet there is no question that the privilege is in fact alienable both outside of bankruptcy and in bankruptcy, either as part of a commercial transaction or by reason of the inability of the original holder of the privilege to exercise it. That alienability denigrates neither the privilege nor the parties to the transaction by which it moves from one to the other.

action); *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982) (finding that privileges pass by operation of law to trustee with respect to malpractice claim against liability insurer).

⁹⁵ See, e.g., *Bourget v. Gov't Employees Ins. Co.*, 48 F.R.D. 29, 33 (D. Conn. 1969). These cases can more properly be explained by the principle that one party sharing a common legal interest in the subject matter of the confidential communication may not assert the privilege against another. See, e.g., *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1973); *Perez v. Sphere Drake Ins. Ltd.*, 2002 WL 31618812 (D.V.I. Feb. 15, 2000); *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 187 (D.D.C. 1998) (finding that an insurer cannot assert privilege against assignee of insured under common legal interest theory). Under either theory, the courts recognize that the assignee or subrogee of the client succeeds to the attorney-client privilege with respect to the assigned claim.

⁹⁶ *French v. Miller (In re Miller)*, 247 B.R. 704, 709 (Bankr. N.D. Ohio 2000); see also *In re Jaeger*, 213 B.R. 578, 590 n.15 (Bankr. D.C. Cal. 1997) (holding that the right to assert a conflict of interest is not property of the estate "because it cannot be liquidated for the benefit of creditors").

⁹⁷ See, e.g., *Bansch*, *supra* note 54, at 136 ("It is contrary to the mandate of the privilege . . . to treat it as a chattel and pass it to those other than the client."); *Mitchelson*, *supra* note 37, at 1238 ("[T]he right to assert or waive the attorney-client privilege is not a right that can be bought, sold, or levied upon by creditors."); *Thomas*, *supra* note 54, at 659 ("[T]he analytical validity of this argument is . . . implicitly disfavored.").

⁹⁸ See at *supra* note 36.

The transfer of the attorney-client privilege as part of a consensual transfer of assets is far from uncommon, even in the bankruptcy context. For example, in *American Metrocomm Corp. v. Duane Morris & Heckscher L.L.P.*,⁹⁹ the chapter 11 debtor entered into an agreement with a subsidiary of one of its creditors pursuant to which the debtor assigned its interest in certain litigation claims, "together with all Shared Privileges and Privileged Materials related thereto."¹⁰⁰ The "Shared Privileges" and "Privileged Materials" were expressly defined to include the attorney-client privilege relating to the assigned claims. The agreement further provided that the assignee was to "have the right to manage, waive, enforce or otherwise deal with" the privilege.¹⁰¹ There was no suggestion that the agreement was ineffective because a privilege is too personal to be an "alienable commodity."

Indeed, even in *In re Hunt*,¹⁰² the oft-cited post-*Weintraub* case refusing to allow the liquidating trustees under the debtors' chapter 11 plans of reorganization to waive the individual debtors' privilege, the court noted that "the Hunts' reorganization plans are silent as to the transfer of privileges along with the avoidance actions," implying that the privilege could have been transferred by agreement.¹⁰³

Outside the commercial arena, the privilege can be exercised by those other than the original holders when the holders are unable to exercise the privilege for themselves. For example, the Supreme Court held in *Swidler & Berlin v. United States*¹⁰⁴ that as a matter of federal common law the attorney-client privilege survives the death of its holder.¹⁰⁵ The conclusion of the Court was consistent with Uniform Rule of Evidence 502¹⁰⁶ and Proposed

⁹⁹ *Am. Metrocomm Corp. v. Duane Morris & Heckscher L.L.P.* (*In re Am. Metrocomm Corp.*), 274 B.R. 641 (Bankr. D. Del. 2002).

¹⁰⁰ *Id.* at 647.

¹⁰¹ *Id.* at 648.

¹⁰² 153 B.R. 445 (Bankr. N.D. Tex. 1992).

¹⁰³ *Id.* at 454.

¹⁰⁴ 524 U.S. 399 (1998).

¹⁰⁵ The Court's decision did not address whether there is someone after the death of a client who controls it, or whether the privilege continues forever without a holder. See generally Richard C. Wydick, *The Attorney-Client Privilege: Does it Really Have Life Everlasting?*, 87 Ky. L.J. 1165 (1999).

¹⁰⁶ Rule 502(c) of the Unified Rules of Evidence provides as follows:

(c) Who may claim privilege. The privilege [under this rule] may be claimed by the client, his client's guardian or conservator, the personal representative of a

Federal Rule of Evidence 503,¹⁰⁷ both of which contemplate that the holder of the privilege can be someone other than the individual client if the client is under guardianship or is deceased.¹⁰⁸ Clearly the privilege is not so personal and inalienable that no surrogate can exercise it.

But even if the privilege is capable of transfer that does not mean that the trustee should be able to exercise it merely because the trustee possesses the property of the debtor. In the commercial context, the transfer of the privilege is generally consensual.¹⁰⁹ Some courts have held that an entity that acquires all or substantially all of the assets of an insolvent privilege holder becomes the successor of that holder for purposes of asserting or waiving the privilege.¹¹⁰

deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

UNIF. R. EVID. 502(c).

¹⁰⁷ Proposed Federal Rule of Evidence 503(c) was identical to Uniform Rule of Evidence 502(c). FED. R. EVID. 503(c). Like the other proposed rules dealing with specific privileges, it was rejected by Congress in favor of Federal Rule of Evidence 501. See *supra* note 5. Nevertheless, the proposed rules remain a valuable resource in discerning federal common law on privilege. See, e.g., *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981); *In re Grand Jury Proceedings*, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

¹⁰⁸ See, e.g., *Lietz v. Primock*, 327 P.2d 288, 291 (Ariz. 1958) (finding that the guardian ad litem may waive privilege with respect to the lawsuit concerning which he was appointed); *Moss v. Davis*, 794 A.2d 1288, 1291 (Del Fam. Ct. 2001) (holding that the guardian for the elderly woman could invoke privilege on her behalf); *In re Guardianship of Escola*, 534 N.E. 2d 866, 871 (Ohio App. 1987) (deciding that the guardian may waive physician-client privilege of incompetent ward); *Yancy v. Erman*, 99 N.E.2d 524, 531-32 (Ohio Ct. Comm. P. 1951) (holding that the guardian for incompetent defendant could waive attorney-client privilege); *Mayorga v. Tate*, 752 N.Y.S.2d 353 (App. Div. 2002) (finding that assignee of executory of deceased client's estate may waive privilege). See generally 98 C.J.S. *Witnesses* § 378 (2002); E. S. Stephens, Annotation, *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or by Guardian of Incompetent*, 67 A.L.R.2d 1268 (1959).

¹⁰⁹ See, e.g., *Rhode Island Depositors Econ. Prot. Corp. v. Mapleroot Dev. Corp.*, 710 A2d 167 (R.I. 1998) (finding that Rhode Island Depositors Economic Protection Corporation could exercise privilege when it acquired substantially all assets of insolvent lender from receiver pursuant to asset purchase agreement that explicitly provided for the transfer of all privileges).

¹¹⁰ See, e.g., *Ramada Franchise Sys., Inc. v. Hotel of Gainesville Assoc.*, 988 F. Supp. 1460 (N.D. Ga. 1997) (holding that the purchaser of all the assets of a bankrupt company acquired debtor's attorney-client privilege); *In re Fin. Corp. of Am.*, 119 B.R. 728, 736 (Bankr. C.D. Cal. 1990) (finding that assignees from Federal Deposit Ins. Corporation of assets of insolvent savings and loan may assert privilege); *FDIC v. Cherry, Bekaert & Holland*, 129 F.R.D. 188 (M.D. Fla. 1989) (deciding that the FDIC in its corporate capacity as assignee of failed bank's

However, most courts reject the notion that privilege attaches to property rather than persons,¹¹¹ and conclude that the assignee of property in a commercial context does not acquire the right to assert or waive the privilege with respect to communications relating to that property.¹¹² Under this view, the transfer to the trustee of even substantially all the property of an individual (that is, all property not excluded from the definition of property of the estate under § 541 of the Code) should not carry with it the debtor's privilege, even if the privileged communications relate to the property so transferred.¹¹³

assets acquired the right to assert privilege); *In re Crescent Beach Inn, Inc.*, 37 B.R. 894, (Bankr. D. Me. 1984) (holding the assignee of all debtor's tangible and intangible assets pursuant to reorganization plan succeeded to attorney-client privilege); *Talley Indus., Inc. v. United States*, 188 U.S.P.Q. 368, 374 (Cl. Cl. 1975) (deciding that the purchaser of all the assets of a company controls privilege when seller subsequently dissolved). The Federal Deposit Insurance Corporation, acting as conservator or receiver, succeeds to the privileges of a failed financial institution pursuant to 12 U.S.C. § 1821(d)(2)(A)(i). See, e.g., *Fin. Corp.*, 119 B.R. at 737. See generally 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS OF COMMON LAW § 2328, at 639 (rev. ed. 1961) ("Where the client's interest has been assigned, . . . the privilege is transferred to the assignee, for the purpose of waiver, so far as the communications affect merely the realization of the transferred interest; but it remains with the client so far as they affect any liability or right remaining in him.").

¹¹¹ See, e.g., *Talley Indus., Inc.*, 188 U.S.P.Q. 2d at 373 ("[T]he privilege . . . was not to protect the subject matter involved [i.e., the property or interest under discussion] . . . but, rather, to protect the relationship of the lawyer and client to facilitate an openness of communications.").

¹¹² See, e.g., *In re Hunt*, 153 B.R. 445, 453-54 (Bankr. N.D. Tex. 1992) (stating that the transfer by debtors-in-possession of avoidance causes of action to independent trustees did not transfer privileges); *NCL Corp. v. Lone Star Bldg. Ctrs. (Eastern), Inc.*, 144 B.R. 170, 174 (Bankr. S.D. Fla. 1992) (holding that the assignment of the lease did not transfer attorney-client privilege with respect to communications between original lessee and counsel); *In re Grand Jury Subpoenas 89-3 and 89-4*, 734 F. Supp. 1207, 1211 n.3 (E.D. Va. 1990), *vacated in part on other grounds*, 902 F.2d 244 (4th Cir. 1990) (stating that transfer of assets does not effect transfer of privilege unless control of entity also passes); *FDIC v. McAtee*, 124 F.R.D. 662, 664 (D. Kan. 1988) (deciding that the transfer of assets does not transfer privilege); *Sobol v. E. P. Dutton, Inc.*, 112 F.R.D. 99, 102-03 (S.D.N.Y. 1986) (finding that the purchaser of rights to author's books did not acquire privilege with respect to communications between seller and counsel about contacts with author); *NL Indus., Inc. v. Koomey, Inc.*, 647 F. Supp. 936 (S.D. Tex. 1984) (noting that the transfer and assignment of patent does not transfer privilege with respect to patent); cf. *Celanese Corp. v. Leesona Corp. (In re Yarn Processing Patent Validity Litig.)*, 530 F.2d 83 (5th Cir. 1976) (finding that the assignee of the patent did not become former client of attorney for assignor); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 836 F.2d 1332 (Fed. Cir. 1988) (same). See generally John T. Hundley, *White Knights, Pre-Nuptial Confidences, and the Morning After: The Effect of Transaction-Related Disclosures on the Attorney-Client and Related Privileges*, 5 DEPAUL BUS. L.J. 59, 94-96 (1992/1993).

¹¹³ See Mitchelson, *supra* note 37, at 1259.

Bankruptcy could be analogized to a financial death, or a judicial recognition of the debtor's incapacity to manage his financial affairs. Nevertheless, if one is comparing bankruptcy to the cases in which a representative may assert or waive the privilege on behalf of another outside the commercial field, there are distinctions that may make the bankruptcy trustee a less satisfactory representative of the debtor for purposes of the privilege than a personal representative of a decedent or a guardian of a minor or incompetent. The bankruptcy trustee has no fiduciary duty to the debtor; the trustee owes his duties to the creditors.¹¹⁴ The trustee will not, and should not, act in the best interests of the debtor in deciding whether to waive the privilege, but will pursue his statutory obligations to collect property of the estate and investigate the financial affairs of the debtor.¹¹⁵ Only when the interest of the privilege holder is adequately protected has the law permitted the privilege to be transferred to a representative by a holder who has not voluntarily conferred that responsibility upon the other person. Bankruptcy does not create sufficient protections for the privilege holder to allow the trustee automatically to waive the privilege on the holder's behalf.

Characterizing the privilege as property of the estate or an interest in such property would also have some untoward consequences. As suggested by one commentator, if the privilege is controlled by the party with possession of property of the estate, the privilege would be controlled by different parties depending on which chapter of the Code governed the case.¹¹⁶ In a chapter 7 case, the trustee takes possession of property of the estate¹¹⁷ and would presumably have the right to assert or waive the privilege. By contrast, in a chapter 13 case, the debtor remains in possession of all property of the estate and would retain the privilege.¹¹⁸ In a chapter 11 case, control over the privilege could be vested in the debtor in possession or, if one is appointed, in the trustee. If a case is converted from one chapter to another, or a trustee is appointed

¹¹⁴ The trustee is the "representative of the estate." 11 U.S.C. § 323(a) (2003). In a chapter 7 or chapter 11 case, a trustee may be elected by unsecured creditors. *Id.* §§ 702, 1104.

¹¹⁵ *Id.* §§ 704, 1106.

¹¹⁶ Herman, *supra* note 54, at 566.

¹¹⁷ 11 U.S.C. §§ 521(4), 542.

¹¹⁸ *Id.* § 1306(b).

and then terminated in a chapter 11 case, control over the privilege could “ping-pong”¹¹⁹ from debtor to trustee and back again, a result that lacks predictability and undermines confidence in the privilege.

The lack of clarity in the statutory language of § 541, the absence of compelling analogies outside the bankruptcy context, and the policy concerns discussed above all lead to the conclusion that, even if the attorney-client privilege could plausibly be deemed to be included in the estate consistent with the language of § 541, the “property” theory is not a completely satisfactory resolution of the issue of who controls the privilege of the individual debtor in bankruptcy.

C. *Case-by-Case Approach*

Many courts have been reluctant to endorse a rule that would either permit the trustee to waive the privilege for an individual debtor in all cases, or that would preclude waiver by such a trustee in all cases. Instead, these courts have endorsed an ad hoc case by case approach, allowing waiver by the trustee only when the need of the trustee for the communication to fulfill his fiduciary obligations to the estate outweighs any potential harm to the debtor caused by waiver of the privilege.

In perhaps the easiest case for the trustee, if the debtor is no longer present to assert or waive the privilege, the trustee receives the power by default. In *In re Fairbanks*,¹²⁰ the individual debtor (who had been indicted on various criminal offenses in connection with treatment of client funds in his law practice and was forced into bankruptcy involuntarily) disappeared shortly after the filing and his current whereabouts were unknown. Given the “extraordinary circumstances”¹²¹ of the absence of a client who could “act for himself”¹²² in asserting or waiving the privilege, the court concluded that the trustee—as the debtor’s “financial ‘alter ego’”¹²³ with a need for the privileged records to administer the abandoned estate—could waive the privilege.¹²⁴

¹¹⁹ Herman, *supra* note 54, at 566.

¹²⁰ 135 B.R. 717 (Bankr. D.N.H. 1991).

¹²¹ *Id.* at 723.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; see also *In re Ingram*, No. Civ. A. 98-05909-W, 1999 WL 33486089, at *1 (Bankr. D.S.C. Apr. 15, 1999) (allowing trustee to waive privilege when voluntary chapter 7 debtor

However, when the individual debtor is actively participating in the case and is attempting to protect privileged communications, what factors could justify allowing the trustee to waive the privilege over the debtor's objection? Commentators have suggested considering such factors as whether the case is a liquidation or a reorganization, whether the trustee is seeking the communication to assist in maximizing estate assets or for another purpose, and whether the communications at issue took place prepetition or postpetition.¹²⁵

Only one factor has proven decisive in the reported decisions—whether the court believes that the debtor would be harmed by the disclosure. Thus, when the trustee seeks the privileged communication in order to augment the bankruptcy estate by the recovery of fraudulent transfers or discovery of undisclosed assets, and the court independently concludes that the debtor would not be harmed by disclosure, the trustee may be allowed to waive the privilege even over the debtor's objection.¹²⁶ However, when disclosure of the communication could subject the debtor to criminal prosecution or when the trustee and the debtor have adverse positions with respect to the subject matter of the communication, the trustee is unlikely to be permitted to waive the privilege.¹²⁷

was not represented by counsel in his bankruptcy case, never asserted the privilege, and did not make an appearance at the hearing on the trustee's motion to compel pre-petition counsel to disclose privileged communications).

¹²⁵ See Stephen F. Black, *The Debtor's Attorney-Client Privilege in Bankruptcy*, 40 BUS. LAW. 879, 897-901 (1985); see also Herman, *supra* note 54, at 586 (arguing that the trustee's control over privilege must be limited to prepetition communications).

¹²⁶ See, e.g., *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 377-78 (Bankr. D. Minn. 2000) (distinguishing between communications bearing on recovery of assets for the estate from third party transferees which would cause "no apparent and demonstrable harm to the Debtor" and those that might subject debtor to criminal prosecution); *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1024 (Bankr. S.D. Ga. 1998) (allowing trustee to waive privilege with respect to communications with counsel that might bear on potential malpractice claim against counsel when "[h]arm will not come to" debtors); Cf. *Anderson v. Vereen (In re Vereen)*, Nos. 96-78369, 98-80262-W, 1999 WL 33485642, at *3 (Bankr. D.S.C. Sept. 7, 1999) (allowing trustee to waive privilege in action to recover fraudulent prepetition conveyances without considering potential harm to debtor).

¹²⁷ See, e.g., *Foster v. Hill (In re Foster)*, 188 F.3d 1259 (10th Cir. 1999) (reversing bankruptcy court decision allowing trustee to waive privilege and remanding for balancing of trustee's need for disclosure against potential harm to debtor); *French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N.D. Ohio 2000) (holding that when purpose behind trustee's purported waiver of privilege was to obtain evidence to revoke debtors' discharge, trustee may not control privilege); *In re Rice*, 224 B.R. 464 (Bankr. D. Or. 1998) (finding trustee could not

Although courts and commentators like ad hoc case-by-case balancing approaches to resolution of difficult issues because they give discretion to judges to do what seems equitable under the circumstances,¹²⁸ a test that turns on the court's assessment of harm to the client if disclosure is allowed is inherently unpredictable. Indeed, use of balancing tests in applying the privilege has been consistently rejected by the Supreme Court,¹²⁹ most recently in *Swidler & Berlin v. United States*.¹³⁰ Balancing tests "introduce[] substantial uncertainty into the privilege's application."¹³¹ "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹³²

Such a balancing test is also unduly paternalistic. Should not the client himself—assuming the client is physically present and adequately informed of his rights—be able to make the judgment whether disclosure of privileged communications causes the client harm? No other court is allowed to second-guess a client who wishes to assert the attorney-client privilege, whether the client has a good reason to do so, a bad reason, or no reason at all. If the privilege is not subject to balancing tests, either the client is entitled to assert it or not. If not, the reason must be that the communications are not protected by the privilege,¹³³ the privilege has been waived,¹³⁴ or the

waive privilege related to a prepetition cause of action where defendant claimed some portion of the proceeds as exempt); cf. *Yaquinto v. Touchstone, Bernays, Johnston, Beall & Smith, L.L.P.*, No. Civ. A. 398-CV-1671P, 1999 WL 354228, at *2 (N.D. Tex. June 1, 1999) (holding that trustee should not be able to waive privilege when debtor was involuntarily forced into bankruptcy by adverse party in previous civil proceeding; no discussion of potential harm to debtor).

¹²⁸ See generally Ralph McCullough, Chris Whelchel & Sharyn Epley, *Trustees: The Ability to Waive the Debtor's Attorney-Client Privilege*, 106 COM. L.J. 1 (2001) (endorsing the balancing approach).

¹²⁹ See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996); *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

¹³⁰ 524 U.S. 399, 409 (1998). The Court of Appeals for the District of Columbia had adopted a balancing test, allowing a posthumous exception to the privilege when there was substantial need for the communication in connection with a particular criminal proceeding that outweighed the potential "chilling effect" on lawyer-client communications. *In re Sealed Case*, 124 F.3d 230, 233-34 (D.C. Cir. 1997).

¹³¹ *Swidler*, 524 U.S. at 409.

¹³² *Upjohn*, 449 U.S. at 393; see also Thomas, *supra* note 54, at 667 ("[C]ase-by-case balancing tests make predictability impossible.").

¹³³ A communication between lawyer and client may not be protected by the privilege for many reasons. For example, the communication may not be for the purpose of obtaining legal advice but instead may be for business advice. See, e.g., *United States v. United Shoe*

crime/fraud exception applies.¹³⁵ The fact that the trustee “needs” the privileged communication should be irrelevant. The opposing party always “needs” the privileged communication or it would not seek its disclosure. The case-by-case approach is inherently flawed for this reason.

III. THE IMPLIED WAIVER THEORY

The attorney-client privilege of a bankruptcy debtor has all the scope and majesty of the attorney-client privilege of a non-debtor. It should not be subject to waiver by the trustee at the discretion of the bankruptcy judge. But nor should it enjoy a status of impenetrability that is not shared by the privilege of a non-debtor. Outside of bankruptcy, the holder of the attorney-client privilege will be held to have waived the privilege if he or she takes certain actions which put that privileged communication at issue in the case. This Part looks at the implied waiver doctrine as it has been developed outside of bankruptcy and as it has been applied to bankruptcy cases.

A. *Development of the Implied Waiver Doctrine*

Generally, waivers of the attorney-client privilege must be express to be effective. Indeed, waiver is often defined as the “intentional relinquishment or abandonment of a known right or privilege.”¹³⁶ However, limiting the doctrine of waiver to situations

Mach. Corp., 89 F. Supp. 357, 359-60 (D. Mass. 1950) (“Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged.”). Alternatively, the communication may have been made in the presence of a third party or otherwise not intended to be confidential. *See, e.g., United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984).

¹³⁴ *See, e.g., United Shoe*, 89 F. Supp. at 359 (noting privilege applies only if “not waived by the client”); WIGMORE, *supra* note 110, § 2292 (describing that privileged communications are protected “except the protection be waived”).

¹³⁵ *See, e.g., United Shoe*, 89 F. Supp. at 358 (finding that privilege is not applicable to communications “for the purpose of committing a crime or tort”); *see also In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). *See generally Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1509-14 (1985).

¹³⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United States v. Thorn*, 317 F.3d 107, 130 n.16 (2d Cir. 2003); *United States v. Reed*, 57 Fed. Appx. 656, 657, 2003 WL 236459, at *2 (6th Cir. Jan. 30, 2003); *Strakosch v. JRD Properties, LLC*, No. CV00008183S, 2003 WL 553278, at *1 (Conn. Super. Feb. 13, 2003); *E.C.M. v. State*, 835 So. 2d 1280, 1281 (Fla. App. 2003); *People v. Davis*, No. 235854, 2003 WL 356331, at *3 (Mich. App. Feb. 14, 2003); *May v. State*, 62 P.3d 574, 585 (Wyo. 2003).

in which interested parties affirmatively intend to abandon the privilege would not only severely reduce the number of cases in which waiver would be found, but would also allow parties to use the privilege in ways that constitute abuse of the legal system.

The doctrine of implied or constructive waiver was developed to minimize the opportunities for this type of gamesmanship by construing certain actions of the holder of the privilege as fundamentally inconsistent with continued assertion of the privilege, even if there was no conscious determination to relinquish it. For example, abuse has been found based on actual use of privileged communications in an unfair way. Because one of the requirements for privilege protection is confidentiality of the communication,¹³⁷ when that confidentiality is breached,¹³⁸ courts may find that the privilege has impliedly been waived.

The potential for abuse rests in the possibility that the holder of the privilege who has made such a disclosure continues to assert the privilege with respect to other non-disclosed but related communications. Allowing the privilege to prevent discovery of such other communications may risk presentation of an unbalanced and misleading view of the privileged communications. For example, the holder of the privilege may disclose part of privileged

¹³⁷ See generally WIGMORE, *supra* note 110, at 554 (stating privileged communication must be "made in confidence").

¹³⁸ Confidentiality is certainly breached by voluntary disclosure of privileged communications. See, e.g., *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *Hollins v. Powell*, 773 F.2d 191, 197 (8th Cir. 1985); *Weil v. Inv./Indicators Research & Mgmt. Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *Teachers Ins. & Annuity Assoc. v. Shamrock Broad. Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). Most courts also find such a breach and waiver of the privilege even in the case of involuntary or inadvertent disclosure of privileged communications. See, e.g., *In re Grand Jury Investigation*, 604 F.2d 672, 675 (D.C. Cir. 1979); *Champion Int'l Corp. v. Int'l Paper Co.*, 486 F. Supp. 1328, 1333 (N.D. Ga. 1980); *First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954). Courts differ on whether the waiver is limited to the privileged communications inadvertently disclosed, or extends to other communications. Compare *In re Grand Jury Proceedings*, 1980-81 Trade Cases ¶ 63,195 (D.D.C.), *aff'd*, 604 F.2d 672 (D.C. Cir. 1979) (holding waiver limited to disclosed documents), with *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1191 (D.S.C. 1974) (suggesting broad subject matter waiver is appropriate based on inadvertent disclosure). See, e.g., *Eisenberg v. Gagnon*, 766 F.2d 770, 788 (3d Cir. 1985); *Transamerica Computer Co. v. IBM Corp.* 573 F.2d 646 (9th Cir. 1978). See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1629, 1664 (1985) [hereinafter *Developments*] (stating that implied waiver of undisclosed communications is never appropriate in the case of inadvertent waiver). Some courts refuse to find waiver even with respect to the disclosed communications if the disclosure was inadvertent and reasonable precautions were taken to prevent it.

communications in order to advance the holder's case, while withholding other parts of the same or related privileged communications that might support the opposing party.¹³⁹ Courts do not allow the holder to use the privilege as a "shield" while simultaneously using the privileged communication as a "sword" to affirmatively advance the holder's case.¹⁴⁰

But breach of confidentiality is not necessarily the same as actual disclosure of a privileged communication. Another situation in which courts find implied waiver is when the holder of the privilege resists discovery of privileged communications at one stage in the litigation while intending to rely on the same communications at a later stage in order to establish his entitlement to relief.¹⁴¹ If the privilege holder intends to use the privileged communication as part of his case, the privilege holder should not be able to deny the other party discovery of that same privileged communication. Therefore, courts will uniformly find an implied waiver even before the holder of the privilege introduces the privileged communication into evidence if, in order to prevail in the

¹³⁹ This principle is sometimes called the doctrine of "selective disclosure" or "partial disclosure." See *Developments*, *supra* note 138, at 1633-35; T. Maxfield Bahner & Michael L. Gallion, *Waiver of Attorney-Client Privilege via Issue Injection: A Call for Uniformity*, 65 DEF. COUNS. J. 199, 200 (1998). The theory underlying the doctrine is one of fairness. See, e.g., *United States v. (Under Seal)*, No. 88-5546, 1988 WL 76110 (4th Cir. May 13, 1988); *In re Sealed Case*, 676 F.2d 793, 807, 818 (D.C. Cir. 1982); *John Doe Corp. v. United States (In re John Doe Corp.)*, 675 F.2d 482, 489 (2d Cir. 1982); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, Nos. 81 C7076, 82 C6895, 85 C3521, 1987 WL 20408, at *3 (N.D. Ill. Nov. 20, 1987). Cases finding waiver as a result of selective disclosure are legion. See, e.g., *In re Grand Jury Proceedings*, No. M-11-189 (LAP) 2001 WL 237377, at *3 (S.D.N.Y. Mar. 2, 2001), *amended by* No. M-11-189 (LAP), 2001 WL 3111 88 (S.D.N.Y. Mar. 27, 2001); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298 (LMM)(RLE), 93 Civ. 8270 (LMM)(RLE), 94 Civ.1317 (LMM)(RLE), 93 Civ. 6876 (LMM)(RLE), 1998 WL 567862, at *1 (S.D.N.Y. Sept. 3, 1998); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987); *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973).

¹⁴⁰ See, e.g., *Cox v. Adm'r United States Steel & Carnegie.*, 17 F.3d 1386, 1417 (11th Cir. 1994), *modified* 30 F.3d 1347 (11th Cir. 1994); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987); *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298 (LMM)(RLE), 93 Civ. 6876 (LMM)(RLE), 93 Civ. 8270 (LMM)(RLE), 93 Civ. 1317 (LMM)(RLE), 1996 WL 173138, at *3 (S.D.N.Y. Apr. 12, 1996); *Wardleigh v. Second Judicial Dist. Court*, 891 P.2d 1180, 1186 (Nev. 1995).

¹⁴¹ This type of behavior is sometimes called "strategically timed disclosure," and is disfavored because it may result in unfair surprise to the opposing party. See *Developments*, *supra* note 138, at 1632-33.

case, the holder must at some point do so. This approach has been characterized as the “anticipatory waiver” theory,¹⁴² and even courts that are the most protective of the privilege have indicated that they would disallow the privilege under these circumstances.¹⁴³

Most courts interpret the implied waiver doctrine a bit more expansively, finding waiver when the privileged communication is put “at issue” in the case even if the holder does not intend to introduce it into evidence.

A few courts have found an implied waiver of the privilege by the mere assertion of a claim or counterclaim that renders the privileged communication relevant.¹⁴⁴ Dubbed the “automatic waiver” rule,¹⁴⁵ this approach has been rejected by most courts because it appears to permit disclosure of privileged materials without any showing of need for the materials by the opposing party. Because relevance provides an easily met standard for permissible discovery, the automatic waiver rule essentially makes

¹⁴² See *id.* at 1636, 1641-43.

¹⁴³ See, e.g., *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); *Harter v. Univ. of Indianapolis*, 5 F. Supp. 2d 657, 664-65 (S.D. Ind. 1998); *Dixie Mill Supply Co. v. Cont'l Cas. Co.*, 168 F.R.D. 554, 559 (E.D. La. 1996); *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1146 (La. 1987); cf. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 416 (D. Del. 1992); *Aranson v. Schroeder*, 671 A.2d 1023, 1030 (N.H. 1995); *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 173 (N.M. Ct. App. 2000); *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 419 (Wis. Ct. App. 1998).

The “anticipatory waiver” formulation of the implied waiver doctrine cannot operate effectively with respect to a bankruptcy case because in such a case the “plaintiff”-debtor need not prove the elements of any offense to “prevail.” In other words, having filed the petition and schedules, paying the filing fee and appearing for the § 341 hearing, the plaintiff has done what is necessary to obtain a discharge. The burden shifts to the other parties in interest—the trustee, the creditors, the U.S. Trustee—to seek the turn-over of property, to make objections to claimed exemptions, to object to discharge of particular claims under § 523, to object to discharge under § 727, to challenge transactions as preferential or fraudulent transfers, to exercise the strong-arm power. The privileged communications never need be introduced as part of debtor’s case in chief, because there is no presentation of a case in chief. Thus, there can never be an anticipatory waiver.

¹⁴⁴ See, e.g., *Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 477 (D. Colo. 1992); *Compagnie Francaise d'Assurance Pour Le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 25 n.2 (S.D.N.Y. 1984); *Ghana Supply Comm'n v. New England Power Co.*, 83 F.R.D. 586, 593-94 (D. Mass. 1979); *Anderson v. Nixon*, 444 F. Supp. 1195, 1200 (D.D.C. 1978); *Cont'l Cas. Co. v. Dickerson*, 338 F. Supp. 759, 761 (W.D. Pa. 1972); *Fed. Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 53 F.R.D. 260, 262 (W.D. Okla. 1971); *Indep. Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958).

¹⁴⁵ See, e.g., *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 634 (D. Kan. 2000); *Zenith Radio Corp. v. United States*, 588 F. Supp. 1443, 1444-45 (Ct. Int'l Trade 1984), *rev'd*, 764 F.2d 1577 (Fed. Cir. 1985).

the privilege inapplicable as the price for asserting a claim or defense. While such a rule is easy to administer, it gives insufficient weight to the policies underlying the privilege in the usual civil case.¹⁴⁶

In *Hearn v. Rhay*,¹⁴⁷ the court proposed a more restrictive test, suggesting three criteria for implied waiver based on the conduct of a privilege holder. First, the privilege holder must have taken some affirmative act, such as filing suit, that results in assertion of the privilege. Second, as a result of this affirmative act, the privileged communication has been placed in issue by becoming relevant to the action. Third, protecting the privileged communication from disclosure would deny the opposing party information vital to the opponent's defense.¹⁴⁸

Hearn was a civil rights case brought by an inmate in a Washington state penitentiary.¹⁴⁹ Plaintiff alleged that his confinement in the mental health unit of the facility violated his right to due process and his right to be free of cruel and unusual punishment under the Eighth Amendment.¹⁵⁰ The defendants, the superintendent of the penitentiary and the superintendent of the mental health ward, asserted several affirmative defenses, including the defense that they acted in good faith and were therefore not liable for damages based on the doctrine of qualified immunity.¹⁵¹ Plaintiff sought discovery of documents concerning legal advice given to the defendants by the state attorney general.¹⁵² The defendants claimed that such documents were protected by the attorney-client privilege.¹⁵³ The court held that the privilege was impliedly waived under the three-step test.¹⁵⁴ First, the defendants had taken the affirmative act of raising the good faith defense; second, by that act, defendants placed at issue the legal advice they received; and third, assertion of the privilege would deprive plaintiff

¹⁴⁶ Two commentators have suggested that, "[c]arried to its ultimate conclusion, the automatic waiver rule would destroy the attorney-client privilege any time a litigant asserted a claim or defense." Bahner & Gallion, *supra* note 139, at 201.

¹⁴⁷ 68 F.R.D. 574 (E.D. Wash. 1975).

¹⁴⁸ *Id.* at 581.

¹⁴⁹ *Id.* at 576.

¹⁵⁰ *Id.* at 577.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 581.

of information necessary to defeat the affirmative defense and to prove the elements of his claim.¹⁵⁵

The court emphasized that *Hearn* was an unusual case in that “the content of defendant’s [sic] communications with their attorney is inextricably merged with the elements of plaintiff’s case and defendants’ affirmative defense. . . . [T]hey inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues.”¹⁵⁶ The privilege should prevent disclosure if “the injury the relationship would suffer from disclosure is greater than the benefit to be gained thereby.”¹⁵⁷

The *Hearn* test has been applied to find an implied waiver of the privilege in a broad range of cases. In what could be seen as the easiest case for waiver, courts have applied the *Hearn* test when the holder of the privilege asserted as a defense his good faith reliance on the advice of counsel.¹⁵⁸ In a similar vein, when the litigant’s claim is based in part on the activities of his counsel (as when ineffective representation by counsel is alleged, or counsel is sued for malpractice), application of the *Hearn* factors has lead to a finding of waiver.¹⁵⁹ When the knowledge or state of mind or intent or good faith of the privilege holder is an element of the holder’s claim or defense, and communications with counsel bear on that issue, waiver may be implied.¹⁶⁰ And in cases where plaintiff seeks on

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 582.

¹⁵⁷ *Id.* (citing 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2285 at 527 (John T. McNaughton rev. ed. 1961)).

¹⁵⁸ See, e.g., *Columbia Pictures Television, Inc. v. Krypton Bd. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001); *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726 2001 WL 1818698, at *3 (W.D. Mich. Apr. 3, 2001); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, Nos. 93 Civ. 6876 (KMW), 94 Civ. 1317 (KMW), 1995 WL 598971, at *3 (S.D.N.Y. Oct. 11, 1995); *Dorr-Oliver Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008, 1012 (N.D. Ill. 1993); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 570-71 (E.D. Pa. 1989); *Cuervo v. Snell (In re Snell)*, 232 B.R. 684, 685 (Bankr. S.D. Ohio 1999); *Johnston v. Comm’r of Internal Revenue*, 119 T.C. 27, 36-41 (2002).

¹⁵⁹ See, e.g., *Johnson v. Ala.*, 256 F.3d 1156, 1178 (11th Cir. 2001); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 210 F.R.D. 506, 511 (S.D.N.Y. 2002); *Harrelson v. United States*, 967 F. Supp. 909, 915 (W.D. Tex. 1997); *Tunick v. Day, Berry & Howard*, 486 A.2d 1147, 1149 (Conn. Super. Ct. 1984); *Pappas v. Holloway*, 787 P.2d 30, 36-37 (Wash. 1990); *State v. Simpson*, 548 N.W. 2d 105, 108 (Wis. Ct. App. 1996).

¹⁶⁰ See, e.g., *United States v. Karlic*, No. 96-55413, 1997 WL 342210, at *2 (9th Cir. June 17, 1997); *Cox v. Adm’r United States Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994), *modified*, 30 F.3d 1347 (11th Cir. 1994); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.

equitable grounds to avoid the statute of limitations, defendants have successfully argued that they should get access to communications between plaintiff and counsel bearing on plaintiff's failure to institute the cause of action during the limitations period.¹⁶¹

Although the *Hearn* test has been criticized for allowing disclosure of privileged communications in too many cases,¹⁶² it has become the majority approach to implied waiver.¹⁶³ But the claim of implied waiver has not been made in many bankruptcy cases, and even when a party successfully asserts that debtor impliedly waived the privilege, bankruptcy courts have interpreted the doctrine very narrowly.

B. *Implied Waiver in Bankruptcy*

Very few bankruptcy cases raise the issue of implied waiver at all. Those few cases in which implied waiver has been asserted in bankruptcy cases fall into five general categories. In the first category, the debtor (or a representative of the debtor) commences an action against a creditor or other third party in order to recover assets for the estate and the other party claims that the debtor's

1991); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206-07 (8th Cir. 1982); *Cleveland Indians Baseball Co. v. United States*, No. 96-CV-2240, 1998 WL 180623, at *5-6 (N.D. Ohio Jan. 28, 1998); *Federal Deposit Ins. Corp. v. Wise*, 139 F.R.D. 168, 172 (D. Colo. 1991); *United States v. Exxon Corp.* 94 F.R.D. 246, 249 (D.D.C. 1981); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 447 (S.D. Fla. 1980).

¹⁶¹ See, e.g., *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 234 (E.D.N.Y. 1994); *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y. 1976); *Wardleigh v. Second Judicial Dist. Court*, 891 P.2d 1180, 1187 (Nev. 1995).

¹⁶² See, e.g., *supra* note 145 (citing cases discussing the automatic waiver rule); see generally *Developments, supra* note 138, at 1639-43. Other courts critical of *Hearn* have adopted a "balancing" approach. See, e.g., *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 20 (1st Cir. 1988); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 847 F. Supp. 360, 363 (W.D. Pa. 1994), *vacated*, 40 F.3d 1240 (3d Cir. 1994); *Black Panther Party v. Smith*, 661 F.2d 1243, 1271-72 (D.C. Cir. 1981), *vacated sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982).

¹⁶³ See, e.g., *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1205 (Fed. Cir. 1987); *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997); *Pippenger v. Gruppe*, 883 F. Supp. 1201, 1204 (S.D. Ind. 1994); *Paramount Communications, Inc. v. Donaghy*, 858 F. Supp. 391, 395 (S.D.N.Y. 1994); *Fed. Deposit Ins. Corp. v. Wise*, 139 F.R.D. 168, 171-72 (D. Colo. 1991); *Western Gas Processors, Ltd. v. Enron Gas Processing Co.*, 1989 WL 20529, at *5 (D. Colo. Mar. 6, 1989); *Zenith Radio Corp. v. United States*, 588 F. Supp. 1443, 1446 (Ct. Int'l Trade 1984); *rev'd* 764 F.2d 1517 (Fed. Cir. 1985); cf. *Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701 (10th Cir. 1998) (rejecting automatic waiver rule and finding no implied waiver under *Hearn*).

privilege is impliedly waived. Implied waiver has been found on the basis of debtor's selective disclosure of privileged communications,¹⁶⁴ and because the debtor put the privileged communication at issue by the assertion of the claim.¹⁶⁵ Other courts have found no implied waiver in the absence of affirmative use of privileged materials by the debtor.¹⁶⁶

The second category is a variation on the first—again the action is commenced on behalf of the debtor, but it is the debtor or the debtor's representatives who claims implied waiver of privilege by the non-debtor defendant based on the defense raised to the action. When the defendant is not related to the debtor, the implied waiver claim has succeeded.¹⁶⁷ When, however, the trustee sues the debtor's former counsel, the privileged communications with the debtor have been protected against an implied waiver claim.¹⁶⁸

In the third category the debtor (or a representative of the debtor) is the defendant in an action brought by a creditor and the creditor claims that the debtor has impliedly waived the privilege. If the debtor affirmatively defends on the basis of reliance on advice of

¹⁶⁴ See, e.g., *Granite Partners, L.P. v. Bear, Stearns & Co.*, 184 F.R.D. 49, 54-55 (S.D.N.Y. 1999) (finding implied waiver based on distribution of report of internal investigation into causes of debtors' collapse); *Gottlieb v. Wiles*, 143 F.R.D. 241, 249 (D. Colo. 1992) (finding implied waiver in distribution of report of internal investigation to SEC, U.S. Attorney's office, and others).

¹⁶⁵ See, e.g., *Durkin v. Shields (In re Imperial Corp. of Am.)*, 179 F.R.D. 286 (S.D. Cal. 1998) (finding legal malpractice claim by trustee for post-bankruptcy litigation trust in which trustee sought to avoid statute of limitations impliedly waived privilege with respect to communications with debtor's former counsel bearing on knowledge of claim during limitations period); *Gordon v. Friedman's, Inc. (In re Gordon)*, 209 B.R. 414, 418 (Bankr. N.D. Miss. 1997) (seeking damages for emotional distress based on creditor's postpetition collection threats put advice of counsel at issue).

¹⁶⁶ See, e.g., *RDM Holdings, Inc. v. Equitex, Inc. (In re RDM Sports Group, Inc.)*, 277 B.R. 415 438 (Bankr. N.D. Ga. 2002); cf. *Gottlieb*, 143 F.R.D. at 248 n.12 (finding record insufficient to permit determination of whether certain documents fall within implied waiver doctrine in litigation by trustee against former chairman of the board of corporation).

¹⁶⁷ See, e.g., *Pereira v. United Jersey Bank*, No. 94 Civ. 1565(LAP), 94 Civ. 1844(LAP), 1997 WL 773716, at *2-6 (S.D.N.Y. Dec. 11, 1997) (finding defendant in preference action impliedly waived privilege by raising defense of good faith setoff); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987) (finding defendant waived privilege by disclosing privileged documents to third parties, but not by mere assertion that it acted reasonably).

¹⁶⁸ See *Danning v. Donovan (In re Carter)*, 62 B.R. 1007, 1014 (Bankr. C.D. Cal. 1986).

counsel, implied waiver has been found.¹⁶⁹ Otherwise, the debtor has not been found to have impliedly waived the privilege.¹⁷⁰

The fourth category is a variation on the third—again the action is commenced by a creditor against the debtor (or a representative of the debtor), but the debtor claims that the plaintiff creditor has impliedly waived the privilege. In this situation the implied waiver claim has sometimes succeeded¹⁷¹ and sometimes failed.¹⁷²

Finally, implied waiver may be asserted in a bankruptcy case in connection with a claim by one creditor against another or against a third party in which the debtor has no role. In such cases the nature of the litigation claims determines whether implied waiver will be found.¹⁷³

For cases in the fourth and fifth categories, and those in the second category that do not involve actions by the trustee against debtor's former counsel, there are no bankruptcy policy implications to the implied waiver doctrine; the party asserting the privilege is not a debtor. Although the nature of the action by or against such party may be unique to the bankruptcy arena, there are no statutory provisions regulating disclosure of financial information by that party and therefore no additional reason to find implied waiver. However, in those cases in the first and third

¹⁶⁹ See *Cuervo v. Snell (In re Snell)*, 232 B.R. 684, 685 (Bankr. S.D. Ohio 1999).

¹⁷⁰ See *DeMassa v. MacIntyre (In re MacIntyre)*, No. 95-55717, 1996 WL 102577, at *5-6 (9th Cir. Mar. 6, 1996); *Priest v. Interco Inc. (In re Interco Inc.)*, 137 B.R. 1008, 1010-11 (Bankr. E.D. Mo. 1992); cf. *In re Commercial Fin. Servs., Inc.*, 247 B.R. 828 (Bankr. N.D. Okla. 2000) (entering protective order permitting disclosure of certain privileged documents bearing on claims against debtor without triggering waiver for non-disclosed documents).

¹⁷¹ See *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 636-37 (D. Kan. 2000) (finding creditor impliedly waived privilege by claiming negligence by chapter 11 debtor's counsel, thereby putting proximate cause at issue).

¹⁷² See *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, Nos. 90-5052-PHX-GBN to 90-5075-PHX-GBN, 1996 WL 529399 (Bankr. S.D.N.Y. May 30, 1996) (finding former debenture holders of debtor did not waive privilege by suing reorganized debtors for fraudulently procuring confirmation), *aff'd on other grounds*, 1997 WL 31197 (S.D.N.Y. Jan. 8, 1997).

¹⁷³ See *WAMCO, VIII, Inc. v. RTC Land Assets Trust 1995-NP2B (In re Long Point Rd. Ltd. P'ship)*, Nos. 93-72769-JW, 96-8296, 1997 WL 33344311, at *3-6 (Bankr. D.S.C. Sept. 8, 1997) (finding claim by one creditor against another, in which plaintiff's absence of knowledge was essential to establish right to recovery, impliedly waived privilege as to facts bearing on that knowledge); cf. *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y. 1976) (finding implied waiver by plaintiffs in suit by buyers of securities in bankrupt corporation against underwriters of securities under securities laws because plaintiffs sought relief from statute of limitations).

categories, and those suits in the second category that involve the trustee and debtor's former counsel, it is the privilege of a debtor that is at issue. In those situations, courts have failed to recognize that the implied waiver analysis as it applies to the debtor does not begin with the affirmative action of filing an adversary proceeding or an affirmative defense. The implied waiver analysis must begin with the filing of the bankruptcy case itself.

IV. THE IMPLIED WAIVER "SOLUTION"—A BANKRUPTCY APPROACH TO PRIVILEGE

The nature of the bankruptcy process requires a new analysis of privilege and implied waiver, one that may resolve many of the cases in which courts have struggled with the identity of the holder of the privilege by demonstrating that the privilege no longer exists and therefore cannot be asserted or waived by anyone. This Part lays out a two-step analysis for privilege issues in bankruptcy.

First, the court should examine whether the communication satisfies the requirements for privilege protection. As discussed below, many communications from a debtor to counsel are not entitled to privilege protection either because they do not involve legal advice or because they were never intended to be confidential. Second, the court should consider whether the debtor has impliedly waived the privilege by commencing the bankruptcy case. This Part will conclude that the action taken by a voluntary debtor in seeking relief from his creditors waives the attorney-client privilege with respect to what is necessarily "at issue" in a bankruptcy case—the debtor's financial condition.

A. *Is There a Privilege?*

Analysis of the attorney-client privilege in bankruptcy (as in other contexts) should begin with the question of whether the communication at issue is entitled to the protection of the privilege at all. In perhaps the classic statement of the privilege, Dean Wigmore set forth the requirements as follows:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at

his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹⁷⁴

Communications alleged to be protected in bankruptcy may lack certain attributes necessary for that protection. For example, the communications may have been made not for the purpose of securing legal advice, but instead for obtaining business advice. Even when such communications are made to a lawyer, they are not entitled to the protection of the privilege unless the lawyer is predominantly giving legal advice.¹⁷⁵ In bankruptcy cases, the allegedly privileged communications frequently relate to business transactions undertaken by a debtor prior to filing. If the lawyer is acting merely as a business executive, performing non-legal functions, the communications are not privileged.¹⁷⁶

The privilege does not protect pre-existing documents that are conveyed to counsel, even if the purpose for the transmittal is to obtain of legal advice.¹⁷⁷ Thus, if the debtor/client transmits his business files or notes to the lawyer in the expectation that the lawyer will render legal advice on the basis of what he reads, the files or notes do not thereby become privileged and must be turned over upon request.¹⁷⁸ Any other conclusion would allow clients to immunize their personal papers from disclosure merely by making their lawyers document custodians.

Even if legal advice has been sought from a lawyer acting as such, the communication is not privileged if it was not "made in confidence," meaning that it was not intended to be confidential.

¹⁷⁴ See WIGMORE, *supra* note 110, § 2292 at 554.

¹⁷⁵ See, e.g., *In re Grand Jury Investigation*, 842 F.2d 1223, 1224-25 (11th Cir. 1987); *United States v. Davis*, 636 F.2d 1028, 1043-44 (5th Cir. 1981); see also *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 489 (S.D.N.Y. 1993) (finding communications with attorneys involving scheduling, timing, and supervision of printing of proxy statement and mailing thereof did not involve legal advice and were not protected by privilege).

¹⁷⁶ See, e.g., *Pereira v. United Jersey Bank*, Nos. 94 Civ. 1565 (LAP), 94 Civ. 1844 (LAP), 1997 WL 773716, at *7 (S.D.N.Y. Dec. 11, 1997); *In re Circle K Corp.*, 1997 WL 31197, at *3; *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 511 (D.N.H. 1996); *In re Leslie Fay Cos. Inc. Sec. Litig.*, 161 F.R.D. 274, 282 (S.D.N.Y. 1995); *United States v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 170 B.R. 331, 354-55 (S.D. Ohio 1994).

¹⁷⁷ See, e.g., *Fisher v. United States*, 425 U.S. 391, 403-04 (1976); *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997). See generally MCCORMICK ON EVIDENCE § 89 (John Williams Strong ed., 4th ed. 1992).

¹⁷⁸ See, e.g., *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989); *Marshall v. Marshall (In re Marshall)*, 253 B.R. 550, 556-57 (Bankr. C.D. Cal. 2000), modified 275 B.R. 5 (C.D. Cal. 2002).

Lack of confidential intent is inherently subjective and therefore difficult to prove, but voluntary recourse to bankruptcy may itself demonstrate a lack of confidential intent even when the client testifies that he or she intended the communication to be confidential.

Disclosure by the debtor in bankruptcy cases is not a strategic choice; it is a statutory imperative. To take advantage of the relief afforded by the Bankruptcy Code, a debtor must file a list of creditors and, unless otherwise ordered by the court, a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs.¹⁷⁹ The schedules are very detailed, requiring disclosure of every type of real and personal property in which the debtor has an interest and its value, a complete list of creditors and a description of their claims, all executory contracts and unexpired leases, all co-debtors, debtor's employment, income and expenses, and various transactions that bear on the debtor's financial affairs.¹⁸⁰ Unlike a civil complaint, these schedules are signed by the debtor, declaring that they are true and correct, under penalty of perjury.¹⁸¹ Absent objection to discharge, no further evidence need be submitted by the debtor to the court as to his entitlement to relief. As long as the debtor is an individual, has not filed a waiver of discharge, does not have certain motions pending, and has paid the filing fees, the court must grant the individual debtor a discharge on expiration of the time for filing an objection to discharge,¹⁸² which in a chapter 7 case is sixty days after the first date set for the § 341(a) meeting of creditors.¹⁸³

In most cases, the required lists and schedules are prepared by debtor's attorney based on communications from the debtor. The information so communicated is conveyed for one purpose only—to enable the lawyer to prepare and file the required bankruptcy forms. Information conveyed to counsel with the expectation that it would be disclosed in a public filing is never intended to be confidential and is not protected by the attorney-client privilege.¹⁸⁴

¹⁷⁹ 11 U.S.C. § 521(1) (2003); FED. R. BANKR. P. 1007(b)(1); OFFICIAL BANKR. FORM 6.

¹⁸⁰ OFFICIAL BANKR. FORMS 6, 7. The schedules must be filed either with the petition or, if the debtor files a list of creditors with the petition, may be filed within fifteen days after the petition is filed. FED. R. BANKR. P. 1007(c).

¹⁸¹ FED. R. BANKR. P. 1008.

¹⁸² *Id.* 4004(c).

¹⁸³ *Id.* 4004(a).

¹⁸⁴ The cases arise most frequently in the context of tax returns. When information is

Communications made by a debtor to an attorney with the expectation that their content will be disclosed in the required bankruptcy petition and schedules are equally lacking in confidential intent.¹⁸⁵

Bankruptcy courts have failed to apply this principle. For example, in *In re Stoutamire*¹⁸⁶ the bankruptcy court refused to compel debtor's counsel's legal secretary to answer questions in court about the so-called "intake interview" conducted to elicit information for inclusion on the bankruptcy schedules (which were, in fact filed). While acknowledging that the information actually disclosed on the schedules is not confidential, the court found that the conversations may have included information not ultimately disclosed and the interview gathering that information must therefore be protected.¹⁸⁷ The court's conclusion confuses the requirements for according privileged status to a communication in the first instance (which includes the requirement that the

conveyed to a tax attorney for use in preparing a tax form, it is not protected by the attorney-client privilege. See, e.g., *United States v. Federick*, 182 F.3d 496, 500 (7th Cir. 1999); *United States v. Windfelder*, 790 F.2d 576, 579-80 (7th Cir. 1986); *United States v. Lawless*, 709 F.2d 485, 487-88 (7th Cir. 1983); *United States v. Cote*, 456 F.2d 142, 145 n.3 (8th Cir. 1972); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962); *United States v. Schenectady Sav. Bank*, 525 F. Supp. 647, 653 (N.D.N.Y. 1981); *United States v. Schoeberlein*, 335 F. Supp. 1048, 1057-58 (D. Md. 1971); *United States v. Merrell*, 303 F. Supp. 490, 492-93 (N.D.N.Y. 1969); see also *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984) (finding information given lawyer to assist in preparing prospectus which was to be published not intended to be confidential); *United States v. Tellier*, 255 F.2d 441, 447-48 (2d Cir. 1958) (finding advice to client about proposed bond issue was not privileged when client directed lawyer to disclose it by letter to third persons). But see *United States v. Schlegel*, 313 F. Supp. 177, 179-80 (D. Neb. 1970) (finding privilege protects communicated information that is not actually included in tax return).

¹⁸⁵ See, e.g., *United States v. White*, 970 F.2d 328, 334-35 (7th Cir. 1992) (finding clients who allegedly conveyed documents to attorney to obtain advice whether to file for bankruptcy protection failed to demonstrate that the information conveyed was not intended to be transmitted to third parties). See generally Craig Peyton Gaumer, *Breaking the Code of Silence: Piercing the Attorney-Client Privilege During Bankruptcy Fraud Investigations*, 15 AM. BANKR. INST. J., Mar. 1996, at 10 ("[A]ny discussions between the debtor and counsel about assets that had to be disclosed relate to public information and cannot be characterized as confidential deliberations."); cf. *United States v. Bauer*, 132 F.3d 504 (9th Cir. 1997) (reversing debtor's criminal conviction for making false statements and omitting assets from bankruptcy schedules because district court allowed debtor's bankruptcy counsel to testify that he advised debtor to disclose all property in his bankruptcy schedules and that falsifying a petition constitutes perjury in violation of debtor's attorney-client privilege). But see Craig Peyton Gaumer, *Breaking the Code of Silence (Revisited): Conflicting Views on the Scope of the Attorney-Client Privilege in Bankruptcy Proceedings*, 17 AM. BANKR. INST. J., Sept. 1998, at 8, 34 (critiquing *Bauer*).

¹⁸⁶ 201 B.R. 592 (Bankr. S.D. Ga. 1996).

¹⁸⁷ *Id.* at 596.

communicator intend that the communication be confidential) and the requirements for waiver of the privilege once it exists. If the debtor conveyed information to the legal secretary with a lack of confidential intent (because the information was intended to be made public in the bankruptcy schedules), the communication never satisfied the requirements for privilege, and whether or not it was disclosed in the filed schedules is irrelevant.¹⁸⁸

¹⁸⁸ Of course, to the extent that actual disclosure of privileged communications occurs, the privilege will be waived. Bankruptcy courts have recognized that disclosure of certain privileged communications waives the privilege with respect to other privileged communications on the same subject matter. For example, when the debtor or a bankruptcy trustee undertakes an internal investigation of the debtor and produces, with the assistance of counsel, accountants, and other experts, a report containing fact-finding and analysis which is then published or distributed, the trustee has been found to waive any privilege with respect to the documents underlying the report. *See, e.g., Granite Partners L.P. v. Bear, Stearns & Co.*, 184 F.R.D. 49, 55-56 (S.D.N.Y. 1999); *Gottlieb v. Wiles*, 143 F.R.D. 241, 249 (D. Colo. 1992). If privileged communications are actually disclosed during depositions of the holder of the privilege, or by allowing third parties access to documents containing such communications, the confidentiality necessary to continued preservation of the privilege is lost and the privilege may be deemed waived not only as to the disclosed communications but also as to other communications on the same subject matter when it would be unfair to permit such selective disclosure. *See, e.g., In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1153-54 (N.D. Ill. 1987); *In re Blier Cedar Co.*, 10 B.R. 993, 1000 (Bankr. D. Me. 1981); *cf. In re Commercial Fin. Servs., Inc.*, 247 B.R. 828 (Bankr. N.D. Okla. 2000) (granting motion for protective order providing that disclosure by debtor of certain privileged documents would not waive privilege as to others because disclosure was not for tactical advantage in litigation).

The Code itself implicitly requires some disclosures that are inherently inconsistent with assertion of the privilege. The debtor must surrender to the trustee (if one is appointed) "all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the state." 11 U.S.C. § 521(4) (2003). Any other person having possession, custody or control of property of the estate must deliver it to the trustee unless it is of inconsequential value. *Id.* § 542(a). Although attorneys who hold books and documents relating to the debtor's financial affairs are directed to turn over such papers to the trustee "[s]ubject to any applicable privilege," *id.* § 542(e), there is no such qualification on the obligation of the debtor or others to turn over the debtor's own records. *See, e.g., Keller v. Blinder (In re Blinder, Robinson & Co.)*, 140 B.R. 790, 792-93 (D. Colo. 1992). The theory underlying this turnover is that such papers constitute "part of the bankrupt estate." *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924). Even the constitutional protection against self-incrimination cannot protect the debtor against this compulsory disclosure, because the transfer of such papers to the trustee is "a necessary incident to the distribution of [debtor's] property" under the bankruptcy laws. *Johnson v. United States*, 228 U.S. 457, 459 (1913); *see also Dier v. Banton*, 262 U.S. 147, 149-50 (1923); *In re Fuller*, 262 U.S. 92, 93-94 (1923); *In re Ross*, 156 B.R. 272, 275-77 (Bankr. D. Idaho 1993). *See generally* Craig Peyton Gaumer & Charles L. Nail, Jr., *Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings*, 76 NEB. L. REV. 497, 520-29 (1997). *But see In re Hyde*, 235 B.R. 539 (S.D.N.Y. 1999) (allowing debtor to assert Fifth Amendment to prevent production of books and records of his business to trustee under "act of production" doctrine), *aff'd*, No. 99-5060, 2000 WL 246230 (2d Cir. Feb. 22, 2000). If privileged

Privilege requires confidential intent; bankruptcy requires full disclosure. If one has the intent to make the disclosures required by the Bankruptcy Code in connection with a voluntary bankruptcy filing, communications made in connection with effectuating that intent cannot be made in confidence and therefore cannot be privileged.

B. Has the Privilege Been Waived?

The second step in any privilege analysis in bankruptcy looks to the acts of the client and the attorney after the communication is made. A communication that satisfies the requirements of privilege loses that status if the privilege is waived, either explicitly or implicitly.

Although bankruptcy courts have applied the implied waiver doctrine to the debtor,¹⁸⁹ they lack vision; they fail to recognize that the inherent nature of a bankruptcy case requires a more expansive view of implied waiver by the debtor to avoid undermining the purposes underlying the Code. In sum, the seemingly laudable efforts of courts to protect the debtor's attorney-client privilege allow abuse of the federal courts by voluntary debtors who take the benefits afforded by the bankruptcy process while denying those subject to bankruptcy jurisdiction the necessary tools to assert claims and raise defenses. Assertion of the privilege by an individual debtor who has voluntarily availed himself of the bankruptcy process

communications are disclosed in such records, the privilege is waived with respect to those communications and all others on the same subject matter, whether those other communications are contained in written documents that would otherwise be privileged or whether debtor or counsel are examined with respect to those other communications.

Applying the same principles, the filing of the petition and schedules waives any privilege with respect to those communications actually disclosed by breaching the confidentiality required for the privilege. *See, e.g.,* *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *In re French*, 162 B.R. 541, 548 (Bankr. D.S.D. 1994). Breach of confidentiality is the key to implied waiver of the attorney-client privilege. In this regard the attorney-client privilege must be distinguished from the protection of the Fifth Amendment, where self-incrimination rather than mere disclosure is essential to result in an inadvertent waiver. In *Arndstein v. McCarthy*, 254 U.S. 71 (1920), the Supreme Court declined to find a waiver of the Fifth Amendment privilege against self-incrimination in the filing of a sworn statement of assets and liabilities in a bankruptcy case because such statement did not constitute "an admission of guilt or furnish clear proof of crime." *Id.* at 72 The attorney-client privilege is waived by mere disclosure of the communications without regard to its nature.

¹⁸⁹ *See supra* Part III.B.

to deny the trustee or another party access to communications that are integrally related to debtor's financial condition is inconsistent with the nature of a bankruptcy case. This conclusion follows both from application of the *Hearn* test for implied waiver and from the application of an automatic waiver rule which, I suggest, is more appropriate for a voluntary debtor in bankruptcy.

1. *Hearn v. Rhay*

Bankruptcy courts have applied the *Hearn* test to find implied waiver by a bankruptcy party putting at issue the privileged communications sought to be protected.¹⁹⁰ The doctrine is most frequently invoked when the holder of the privilege asserts a defense that is dependent on the holder's good faith¹⁹¹ or when the

¹⁹⁰ See, e.g., *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 210 F.R.D. 506, 511 (S.D.N.Y. 2002) (finding waiver when third-party plaintiff brought claim against former lead counsel alleging malpractice and breach of fiduciary duty); *IMC Chem., Inc. v. Niro, Inc.*, No. Civ. A.98-2348-JIM, 2000 WL 1466495 (D. Kan. July 19, 2000) (finding waiver when plaintiff brought suit for breach of contract, fraudulent inducement to contract, reckless misrepresentation and professional negligence in which plaintiff alleged contract was ambiguous); *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 637 (D. Kan. 2000) (finding waiver when plaintiff sued debtor's counsel, alleging negligence and fraud with respect to plan of reorganization); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 847 F. Supp. 360, 362-64 (W.D. Pa. 1994), *vacated*, 40 F.3d 1240 (3d Cir. 1994) (finding waiver when insured sued insurer alleging that insured did not intend damage for which it sought payment); *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y. 1976) (finding plaintiff waived privilege by seeking to avoid statute of limitations by estoppel); *WAMCO, VIII, Inc. v. RTC Land Assets Trust 1995-NP2B (In re Long Point Rd. Ltd. P'ship)*, Nos. 93-72769-JW, 96-8296, 1997 WL 33344311, at *2-6 (Bankr. D.S.C. Sept. 8, 1997) (finding waiver when plaintiff based certain causes of action on its lack of knowledge); *Gordon v. Friedman's Inc. (In re Gordon)*, 209 B.R. 414, 418 (Bankr. N.D. Miss. 1997) (finding debtor waived privilege by seeking damages for emotional distress based on postpetition collection efforts by defendant creditor). *But see* *Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701-02 (10th Cir. 1998) (finding plaintiff did not waive privilege by suing for equitable implied indemnity); *Western Gas Processors, Ltd. v. Enron Gas Processing Co.*, Civ. A. No. 87-A-1472, 1989 WL 20529 (D. Colo. Mar. 6, 1989) (finding plaintiff did not waive privilege by bringing action for declaratory relief with respect to rights under contract drafted by counsel); *RDM Holdings, Inc. v. Equitex, Inc. (In re RDM Sports Group, Inc.)*, 277 B.R. 415, 438 (Bankr. N.D. Ga. 2002) (finding trustee did not waive privilege by bringing suit against law firms and attorneys alleging breach of fiduciary duty and negligence, among other things); *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, Nos. 90-5052-PHX-GBN to 90-5075-PHX-GBN, 1996 WL 529399 (Bankr. S.D.N.Y. May 30, 1996), *aff'd on other grounds*, Nos. 96 Civ. 5801 (JFK), 96 Civ. 6479 (JFK), 1997 WL 31197 (S.D.N.Y. Jan. 8, 1997) (finding no waiver when plaintiff debenture holders brought suit against reorganized debtor and acquiring corporation for fraud in connection with confirmation).

¹⁹¹ See, e.g., *Pereira v. United Jersey Bank*, 1997 WL 773716, at *2-6 (S.D.N.Y. Dec. 11, 1997) (finding defendant in preference action asserted defense of setoff, which put at issue

holder affirmatively asserts reliance on the advice of counsel.¹⁹² However, it has also been used when the nature of the action commenced by the holder of the privilege makes the privileged communications relevant to establishing a defense.¹⁹³

The *Hearn* test should also lead to the conclusion that a voluntary bankruptcy filing impliedly waives the privilege with respect to matters that, as the court there suggested, “inhere in the controversy itself” in the sense that they are “inextricably merged with the elements of plaintiff’s [bankruptcy] case.”¹⁹⁴ The first prong of the *Hearn* test for implied waiver is that the “assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party.”¹⁹⁵ A voluntary bankruptcy case is initiated by a filing of a petition by the proposed debtor with the bankruptcy court.¹⁹⁶ Both the language of the *Hearn* test quoted above, and the cases that follow *Hearn*,¹⁹⁷ recognize that the voluntary commencement of a court case can constitute the affirmative act that satisfies the first requirement for implied waiver.

The second requirement for implied waiver under the *Hearn* test is that “through this affirmative act, the asserting party put the

whether right to setoff was asserted in good faith); *Quinn v. Ingram (In re Gibco, Inc.)*, 185 F.R.D. 296, 300-02 (D. Colo. 1997) (finding good faith defense to fraudulent conveyance claim put privileged communications at issue).

¹⁹² See, e.g., *Cuervo v. Snell (In re Snell)*, 232 B.R. 684, 685 (Bankr. S.D. Ohio 1999); *Anderson v. Vereen (In re Vereen)*, Nos. 78369-W, 98-80262-W, 1999 WL 33485642, at *1-2 (Bankr. D.S.C. Sept. 7, 1999).

¹⁹³ See, e.g., *Simmons Foods, Inc.*, 191 F.R.D. at 637 (finding assertion of claims for negligence, detrimental reliance, and fraud put at issue communications bearing on proximate cause); *Durkin v. Shields (In re Imperial Corp. of Am.)*, 179 F.R.D. 286 (S.D. Cal. 1998) (holding malpractice claim against debtor’s prior lawyers put at issue privileged communications); *In re Long Point Rd. Ltd. P’ship*, 1997 WL 33344311, at *4-5 (finding causes of action based on lack of knowledge of defendant’s action waived privilege with respect to communications bearing on knowledge); *In re Gordon*, 209 B.R. at 418 (finding suit against creditor for intentional infliction of emotional distress by threats put at issue knowledge of debtor about legal efficacy of threats and waived privilege for communications with counsel on that issue); cf. *Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.)*, 176 B.R. 223 (M.D. Fla. 1994); *In re RDM Sports Group, Inc.*, 277 B.R. 415; *In re Circle K Corp.*, 1996 WL 529399; *Priest v. Interco Inc. (In re Interco Inc.)*, 137 B.R. 1008 (Bankr. E.D. Mo. 1992); *Providers Fid. Life Ins. Co. v. Tidewater Group, Inc. (In re Tidewater Group, Inc.)*, 65 B.R. 179 (Bankr. N.D. Ga. 1986) (declining to find “at issue” waiver).

¹⁹⁴ *Hearn v. Rhay*, 68 F.R.D. 574, 582 (E.D. Wash. 1975).

¹⁹⁵ *Id.*

¹⁹⁶ 11 U.S.C. § 301 (2003); OFFICIAL BANKR. FORM 1.

¹⁹⁷ See, e.g., *Western Gas Processors, Ltd. v. Enron Gas Processing Co.*, Civ. A. No. 87-A-1472, 1989 WL 20529, at *5 (D. Colo. Mar. 6, 1989).

protected information at issue by making it relevant to the case.”¹⁹⁸ When a debtor voluntarily files for bankruptcy protection, what is “at issue” before the bankruptcy court? Although one could interpret the phrase very broadly to encompass all matters over which the bankruptcy court has jurisdiction,¹⁹⁹ I believe the jurisdictional grant to the bankruptcy courts itself provides a logical limitation on what should necessarily be deemed to be “at issue” in every bankruptcy case. The *Hearn v. Rhay* implied waiver should be confined to those privileged communications that are inextricably entwined with the central functions of a bankruptcy case.

Under 28 U.S.C. § 157(b)(1), bankruptcy judges may “hear and determine” bankruptcy cases and “all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section.”²⁰⁰ “Core proceedings” are defined in § 157(b)(2), and include the allowance or disallowance of claims, orders to turn over property of the estate, objections to discharge, matters involving the automatic stay, and other matters involving administration of the estate.²⁰¹ Although there may be bankruptcy

¹⁹⁸ *Hearn*, 68 F.R.D. at 581.

¹⁹⁹ Pursuant to § 157(a), the district courts are empowered to refer to the bankruptcy judges “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11.” 28 U.S.C. § 157(a) (2000).

²⁰⁰ *Id.* § 157(b)(1).

²⁰¹ *Id.* Section 157(b)(2) provides:

Core proceedings include, but are not limited to—

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;

cases in which particular “core proceedings” are not brought, almost all enumerated “core proceedings” are unique to the bankruptcy forum, and collectively provide a useful definition of what a bankruptcy case is about, that is, what is necessarily “at issue” in such a case. If the privileged communication is relevant to one of these core proceedings, it is necessarily placed at issue by the voluntary commencement of a bankruptcy case and implied waiver may result.

In summary, by filing a petition for relief under the Bankruptcy Code, the debtor is voluntarily putting at issue the assets comprising the bankruptcy estate, the claims against that estate, counterclaims against those claimants, preference and fraudulent conveyance claims, and all other matters described in 28 U.S.C. § 157(b)(2). To the extent that privileged communications bear on those matters (and therefore on the debtor’s entitlement to relief), the second prong of the *Hearn* test is satisfied.

The final requirement for implied waiver under *Hearn* is that “application of the privilege would have denied the opposing party access to information vital to his defense.”²⁰² The problematic aspect of this standard has always been defining what “vital” means. If the level of need is set too low, the critics of the *Hearn* test maintain that the privilege would be waived whenever the protected communication was relevant to the case.²⁰³ Instead, the *Hearn* test has been interpreted to require a very strong showing of need—the party seeking disclosure must be unable to obtain the information sought from other sources and such information must be essential to establishing its claim or defense.²⁰⁴

(N)orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O)other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Id. § 157(b)(2).

²⁰² *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Although the language of this prong seems to suggest that it applies only when a defendant seeks privileged communications from a plaintiff, it has been interpreted more broadly to apply whenever access to the information is essential to allow any party in civil litigation to establish its case.

²⁰³ See, e.g., *United States v. Ohio Edison Co.*, No. C2-99-1181, 2002 WL 1585596, at *5 (S.D. Ohio July 11, 2002).

²⁰⁴ See, e.g., *Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701 (10th Cir. 1998) (finding relevance is insufficient; information must be available from no other source); *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (finding matters were “tangential to and remote from the central legal issue in the case”); *Western Gas*

Application of the third prong is necessarily case-specific, but includes both a procedural aspect and one more substantive in nature. As a procedural matter, the rule requires a sort of exhaustion of discovery remedies. One may not seek to obtain privileged communications when the same information may be obtained (albeit with more effort, expense and time) from alternative sources. The substantive aspect of the third *Hearn* prong is that the privileged communication must be “essential” to the claim or defense of the party seeking discovery.

Such a bifurcated analysis as a condition to discovery has other precedents. For example, a similar approach is generally used to ascertain whether a litigant may depose opposing counsel as part of the discovery process. In the leading case of *Shelton v. American Motors Corp.*,²⁰⁵ the court concluded that two of the conditions that must be satisfied before opposing counsel may be deposed are that the party seeking discovery demonstrate that “no other means exist to obtain the information,” and “the information is crucial to the preparation of the case.”²⁰⁶ Bankruptcy courts are familiar with the application of these standards.²⁰⁷

This type of standard is also commonly applied in connection with the work product doctrine and is codified in the Federal Rules of Civil Procedure. In connection with civil litigation in federal courts, generally “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party”²⁰⁸ However, materials prepared in anticipation of litigation or for trial are afforded additional protection under Federal Rule of Civil Procedure 26(b)(3);²⁰⁹ such materials can be

Processors, Ltd. v. Enron Gas Processing Co., Civ. A. No. 87-A-1472, 1989 WL 20529, at *5 (D. Colo. Mar. 6, 1989) (finding defendants failed to establish that testimony of counsel was only available means of interpreting contracts at issue).

²⁰⁵ 805 F.2d 1323 (8th Cir. 1986).

²⁰⁶ *Id.* at 1327; see, e.g., *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630-31 (D. Kan. 2000) (using *Shelton* factors to quash subpoena directed at attorney for creditor in action against debtor’s attorneys); *Pereira v. United Jersey Bank*, No. 94 Civ. 1565(LAP), 94 Civ. 1844(LAP), 1997 WL 773716, at *7 (S.D.N.Y. Dec. 11, 1997) (applying *Shelton* to grant protective order with respect to deposition of in-house counsel).

²⁰⁷ See, e.g., *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 371 n.2 (Bankr. D. Minn. 2000); *Wiggins v. Peachtree Settlement Funding (In re Wiggins)*, No. 99-40458, 99-06212, 2000 WL 33712300, at *2 (Bankr. D. Idaho Apr. 10, 2000); *In re Muskogee Envtl. Conservation Co.*, 221 B.R. 526, 532 (Bankr. N.D. Okla. 1998).

²⁰⁸ FED. R. CIV. P. 26(b)(1).

²⁰⁹ Federal Rule of Civil Procedure 26(b)(3) reads as follows in relevant part:

obtained “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”²¹⁰

The standards of “substantial need” and “undue hardship” are very familiar to bankruptcy judges.²¹¹ Courts have equated the “at issue” waiver requirements with those set forth in Rule 26(b)(3).²¹² If the information available through the privileged communication is not available from other sources, upon a showing that the privileged communication is essential to the party seeking it, the third prong of *Hearn* should be deemed satisfied and an implied waiver of the privilege should be found.

Although application of *Hearn v. Rhay* leads to the conclusion that a voluntary debtor impliedly waives the protection of the privilege by commencing the bankruptcy case, at least with respect to matters vital to the party seeking discovery, the focus of the test on the need of the moving party for the privileged materials invariably leads the court down the slippery slope of a case-by-case balancing test. Such a test is not only inherently unpredictable, but fails to give adequate weight to the bankruptcy policy of full disclosure reflected in the Bankruptcy Code.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3).

²¹⁰ *Id.*

²¹¹ Federal Rule of Civil Procedure 26 is made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7026. *See, e.g.,* RDM Holdings, Inc. v. Equitex, Inc. (*In re* RDM Sports Group, Inc.), 277 B.R. 415, 422 (Bankr. N.D. Ga. 2002); *In re* S3 Ltd., 252 B.R. 355, 361 (Bankr. E.D. Va. 2000).

²¹² *See, e.g.,* Worthington v. Endee, 177 F.R.D. 113, 118 n.6 (N.D.N.Y. 1998); Tribune Co. v. Purcigliotti, No. 93 Civ. 7222 LAPTHK, 1997 WL 10924, at *7 (S.D.N.Y. Jan. 10, 1997), modified 1998 WL 175933 (S.D.N.Y. Apr. 14, 1998).

2. *Debtor-Litigant Exception—A New Automatic Waiver*

Application of an automatic waiver test would find a waiver upon the filing of a bankruptcy petition by a voluntary debtor with respect to communications bearing on the debtor's financial condition at issue in the bankruptcy case. Although the cases developing the automatic waiver concept outside of bankruptcy do not involve attorney-client privilege, the justification for finding automatic waiver of a plaintiff's privilege in his choice to commence a judicial action is equally compelling in this context. As stated in *Independent Productions Corp. v. Loew's, Inc.*, "[i]t would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense."²¹³

A debtor in a bankruptcy case can be characterized as someone who seeks judicial relief because of his impaired financial health. The debtor seeks a remedy to his ailment in the form of a fresh start, leaving behind the ills that have afflicted the debtor in the past. What is "at issue" in the bankruptcy case is the debtor's financial condition. When we look at the debtor in this light, we can see a useful analogy to a patient who, because of his physical condition, brings an action seeking compensation. In such actions, the physician-patient privilege is impliedly waived because the patient has placed his physical condition at issue.²¹⁴ The same approach is used to find a waiver of the psychotherapist-patient privilege when a litigant puts his mental condition at issue, such as by pleading not guilty by reason of insanity or mental defect.²¹⁵

²¹³ 22 F.R.D. 266, 276 (S.D.N.Y. 1958).

²¹⁴ See, e.g., *Williams v. Rene*, 72 F.3d 1096, 1103 (3d Cir. 1995); *City & Country of San Francisco v. Superior Court*, 231 P.2d 26, 28 (Cal. 1951); *Collins v. Bair*, 268 N.E.2d 95, 99-101 (Ind. 1971); *McNutt v. Keet*, 432 S.W.2d 597, 601-02 (Mo. 1968); *Wargo v. Buck*, 703 N.E.2d 811, 816-19 (Ohio Ct. App. 1997); cf. FED. R. EVID. 504(d)(3) (proposed 1973) (disallowing psychotherapist-patient privilege "as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense").

²¹⁵ See, e.g., *People v. Lines*, 531 P.2d 793, 800 (Cal. 1975); *Watson v. State*, 784 N.E.2d 515, 520 (Ind. Ct. App. 2003); *State v. Carter*, 641 S.W.2d 54, 57 (Mo. 1982); *State v. Hancock*, Nos. CA2001-12-115, CA2001-12-116, 2003 WL 1689612, at *2 (Ohio Ct. App. 2003); cf. *Neftzer v. Neftzer*, 748 N.E.2d 608, 611 (Ohio Ct. App. 2000) (holding that by filing for divorce and seeking custody of the children, wife made her mental and physical condition an element to be considered by the trial court and waived any privilege with respect to medical records relating to physical or mental injuries bearing on custody).

Known as the "patient-litigant exception" to privilege, it recognizes that, as a matter of fairness, the patient should not be able to "simultaneously inject the issue of his or her condition but withhold information so highly relevant to the issue."²¹⁶ Similarly, by seeking relief under the Bankruptcy Code, the debtor has put at issue his financial condition. The debtor should not be able to seek redress for that condition under the Bankruptcy Code and simultaneously shield from discovery communications that bear on that condition. By choosing to avail himself of the protection of the bankruptcy laws, the debtor should be deemed to waive by implication the attorney-client privilege to the extent the privileged communications bear on the condition that is the crux of his suit.

The conclusion that the voluntary decision to commence a bankruptcy case impliedly waives the privilege follows logically from non-bankruptcy law. Yet, it is difficult to find a bankruptcy case applying this principle. For example, in *Carter v. Donovan*²¹⁷ the co-trustees moved to compel the production of documents and the answers to questions from an individual debtor's counsel and argued, among other things that by filing for chapter 11 relief the debtor had waived the privilege.²¹⁸ The court declined to find such a waiver, noting that "[t]he Co-trustees have not cited any cases and this court has not found any reported decisions holding that merely filing a bankruptcy results in a waiver of the attorney-client privilege"²¹⁹

In fact, in most cases the argument of implied waiver is never made. Perhaps counsel's reluctance stems from a concern that the court will equate such an argument with the assertion that the attorney-client privilege cannot exist in bankruptcy, clearly an unpalatable proposition.

²¹⁶ EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.13.3 (2002).

²¹⁷ 62 B.R. 1007 (Bankr. C.D. Cal. 1986).

²¹⁸ *Id.* at 1009-12.

²¹⁹ *Id.* at 1015; see also *In re Muskogee Envtl. Conservation Co.*, 221 B.R. 526, 532 (Bankr. N.D. Okla. 1998) (stating creditors' argument that "without authority, that the mere filing of bankruptcy by the Debtors somehow operates as a waiver of the attorney-client privilege"). However, in *Carter*, the court did suggest in dictum that had the debtor filed the required statement of affairs (which the debtor had failed to do), debtor would have expressly waived his privilege with respect to his relationship with his counsel. *Carter*, 62 B.R. at 1015. As most voluntary debtors actually file the required schedules, implied waiver should be more commonly found on the basis of selective disclosure. See *supra* note 188.

Although such a suggestion has been made,²²⁰ more recent cases have uniformly held that the attorney-client privilege can exist in a bankruptcy case.²²¹ However, recognizing that the privilege may exist in a bankruptcy case (i.e., that the Bankruptcy Code does not itself abrogate the privilege) is not inconsistent with the assertion that it can be waived in whole or in part (either expressly or implicitly) by the holder in bankruptcy as it can outside bankruptcy. Failure to examine whether voluntarily choosing to make the disclosures mandated by the Bankruptcy Code results in a waiver of the attorney-client privilege merely because the Bankruptcy Code itself does not eliminate the privilege is elevating the bankrupt debtor to a position superior to that of any non-bankrupt litigant, an approach the Supreme Court eschewed under *Butner*.

Perhaps the reluctance of courts to consider an implied waiver analysis reflects a concern that recognizing an implied waiver of the privilege upon the voluntary commencement of a bankruptcy case would create a disincentive to the filing of a petition by individual debtors who should avail themselves of the protections of the Bankruptcy Code. Although this may be true, such a disincentive pales by comparison with the other penalties imposed on a debtor who files for bankruptcy. The chapter 7 debtor must relinquish all of his prepetition property to the trustee, and can recover it only if

²²⁰ See *In re Bellis*, 3 F. Cas. 132, 135 (Bankr. S.D.N.Y. 1869); cf. *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924) (rejecting argument that Fifth Amendment privilege against self-incrimination is inapplicable to examination of bankrupt made for the purpose of obtaining possession of property of the estate).

²²¹ See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 722 F.2d 338, 340 (7th Cir. 1984), *rev'd on other grounds*, 471 U.S. 343 (1985); *Weissman v. Hassett* (*In re O.P.M. Leasing Serv., Inc.*), 670 F.2d 383, 386 (2d Cir. 1982); *In re Aspinwall*, 2 F. Cas. 64 (S.D.N.Y. 1874); *In re Krueger*, 14 F. Cas. 870 (D. Mass. 1872); *In re Muskogee Envtl. Conservation Co.*, 221 B.R. at 532. Melvin S. Hoffman, *The Attorney-Client Privilege in Proceedings Under the Bankruptcy Act of 1898 and the Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 231, 239-44 (1979) (arguing that there is no basis for asserting that the attorney-client privilege cannot be asserted in a bankruptcy case). See generally Stephen F. Black, *The Debtor's Attorney-Client Privilege in Bankruptcy*, 40 BUS. LAW. 879, 885-88 (1985) (analyzing the issue of the "survival" of the privilege in bankruptcy and concluding that it should survive in all cases unless waived).

Although the recent cases are unanimous that the privilege survives the bankruptcy of its holder, the principal case on which they rely, *People's Bank of Buffalo v. Brown*, 112 F. 652 (3d Cir. 1902), does not stand for that proposition. The privilege upheld in that case was not the privilege of the debtor but the privilege of a third party witness/attorney with respect to communications with his non-debtor client. *Id.* at 564. Subsequent decisions cite the case for the proposition that the privilege of the debtor survives bankruptcy. See *Weintraub*, 722 F.2d at 340; *In re O.P.M. Leasing Servs., Inc.*, 670 F.2d at 386.

it is exempt,²²² if the trustee abandons it,²²³ or if the debtor can redeem it²²⁴ or reaffirm the debt secured by it.²²⁵ The chapter 13 debtor may keep his property, but at the price of dedicating all his disposable income for a period of three to five years to payment of his debts.²²⁶ The potential loss of the privilege can hardly compare to the loss of property or income most debtors experience as the price for bankruptcy relief.

Implied waiver provides a conceptually satisfactory rationale for a perceived trend in the case law: courts have been far less likely to conclude that the trustee in bankruptcy succeeds to the right to assert or waive the privilege of a debtor when the debtor's entry into bankruptcy was involuntary. Although courts have declined to allow the trustee to waive an individual debtor's privilege even when the debtor voluntarily initiates the bankruptcy case,²²⁷ when the filing is involuntary the debtor's privilege is generally protected.²²⁸

Almost all cases in which courts have deprived involuntary individual debtors of their privilege have unique facts. For example, in *In re Fairbanks*²²⁹ the involuntary bankruptcy debtor had disappeared and could not assert or waive the privilege on his own behalf.²³⁰ Therefore, the court allotted the privilege to the trustee.²³¹ The involuntary individual debtors in *In re Blier Cedar Co.*²³²

²²² 11 U.S.C. § 522(d) (2003).

²²³ *Id.* § 554.

²²⁴ *Id.* § 722.

²²⁵ *Id.* § 524(c).

²²⁶ *Id.* §§ 1322(d), 1325.

²²⁷ See, e.g., *McClarty v. Gudenau*, 166 B.R. 101, 102 (E.D. Mich. 1994); *In re Rice*, 224 B.R. 464, 471 (Bankr. D. Or. 1998); *In re Jaeger*, 213 B.R. 578 (Bankr. C.D. Cal. 1997); *In re Hunt*, 153 B.R. 445, 450-51 (Bankr. N.D. Tex. 1992); cf. *MacIntyre v. DeMassa* (*In re MacIntyre*), No. 95-55617, 1996 WL 102577, at *5-6 (9th Cir. Mar. 6, 1996) (declining to decide issue because no proof offered that either debtors or trustee had waived privilege); *Hudtwalker v. Van Nostrand & Martin* (*In re Vantage Petroleum Corp.*), 40 B.R. 34, 39-49 (Bankr. E.D.N.Y. 1984) (refraining from deciding issue because trustee did not claim right to waive individual debtors' privilege).

²²⁸ See, e.g., *Foster v. Hill* (*In re Foster*), 188 F.3d 1259 (10th Cir. 1999); *Yaquinto v. Touchstone, Bernays, Johnston, Beall & Smith, L.L.P.*, No. Civ. A. 398-CV-1671P, 1999 WL 354228, at *2 (N.D. Tex. June 1, 1999); *In re Butcher*, 38 B.R. 796, 801 (Bankr. E.D. Tenn. 1984); *In re Silvio De Lindegg Ocean Devs of Am., Inc.*, 27 B.R. 28, 28 (Bankr. S.D. Fla. 1982); cf. *In re Boileau*, 736 F.2d 503, 506 n.1 (9th Cir. 1984).

²²⁹ 135 B.R. 717 (Bankr. D.N.H. 1991).

²³⁰ *Id.* at 720.

²³¹ *Id.* at 722.

²³² 10 B.R. 993 (Bankr. D. Me. 1981).

apparently would have been found to control the privilege (unlike the corporation they owned, whose privilege was held to have passed to the trustee²³³), but the court concluded that they had no privilege both because of the crime/fraud exception²³⁴ and because the communications were not intended to be confidential. The involuntary chapter 7 case filed against the individual debtor in *In re Bame*²³⁵ was voluntarily converted to a chapter 11 case before it was involuntarily converted back to chapter 7.²³⁶ The allegedly privileged communications took place during the time the debtor was in the voluntary chapter 11.²³⁷ Also, in *In re Ingram*²³⁸ the bankruptcy court allowed the trustee to waive the privilege of an involuntary pro se debtor who did not object to the waiver or interpose any other assertion of privilege in the case, and who could not be harmed by the disclosure.²³⁹

The leading cases allowing the trustee for an individual debtor to control the privilege are all voluntary bankruptcies.²⁴⁰ While none of those cases explicitly relies on the concept of implied waiver, the equitable principles underlying the waiver doctrine—the idea that one should not be able to use a legal proceeding to one's benefit without making the disclosures necessary to its judicious resolution—may explain the disparate treatment of voluntary and involuntary cases even under existing theories of privilege in bankruptcy.²⁴¹

²³³ *Id.* at 997 n.5.

²³⁴ *Id.* at 999, 1000-01. The privilege is generally inapplicable when the allegedly privileged communication was made in furtherance of an ongoing crime or fraud. *See, e.g.,* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). *See generally* Martin I. Klein & Sarah C. Lichtenstein, *Trustee or Debtor: Who May Assert the Attorney-Client Privilege in Bankruptcy Proceedings*, 57 N.Y. St. B. J. 35 (1985).

²³⁵ 251 B.R. 367 (Bankr. D. Minn. 2000).

²³⁶ *Id.* at 370.

²³⁷ *Id.* at 373-74.

²³⁸ 1999 WL 33486089 (Bankr. D.S.C. Apr. 15, 1999).

²³⁹ *Id.* at *5.

²⁴⁰ *See, e.g.,* Moore v. Eason (*In re Bazemore*), 216 B.R. 1020, 1024 (Bankr. S.D. Ga. 1998); Whyte v. Williams (*In re Williams*), 152 B.R. 123, 129 (Bankr. N.D. Tex. 1992); *In re Smith*, 24 B.R. 3, 3 (Bankr. S.D. Fla. 1982).

²⁴¹ *See Hoffman, supra* note 219, at 237 n.24 (1979) ("[T]he argument in favor of limiting the right of an 'alleged' bankrupt to assert the attorney-client privilege is less compelling than it is with regard to an adjudicated voluntary bankruptcy.").

3. Conclusion

One who is embroiled in a bankruptcy case without his consent should not relinquish those rights and privileges he maintains outside of bankruptcy. To strip such an involuntary debtor of the protection of the privilege would be inconsistent with the notion that waiver requires some affirmative act on the holder's part that justifies the loss of the protection. However, there is no constitutional right to a discharge in bankruptcy.²⁴² When a debtor chooses to seek the benefits afforded by the bankruptcy system by making a voluntary filing, the debtor should not at the same time be able to prevent discovery of communications the revelation of which bear on the just, speedy and inexpensive determination of the action so commenced.²⁴³ The automatic waiver rule—or more precisely, a new debtor-litigant implied waiver—would deny a voluntary debtor the protection of the attorney-client privilege with respect to communications relevant to his financial condition at issue in the case.

By filing for bankruptcy, a debtor is invoking the powers of the court to discharge the debtor from his debts and provide a fresh start in his financial life. Those powers should not be exercised on behalf of one who makes selective disclosure of privileged communications, or who refuses to provide that information which is vital to those whose claims will be discharged, or to the trustee representing those creditors, in ascertaining whether debtor is entitled to that relief. In summary, bankruptcy mandates debtor bare his financial soul as the price of admission; when a debtor chooses to buy a ticket, he cannot complain about the dress code.

²⁴² See *United States v. Kras*, 409 U.S. 434, 446-47 (1973); *Stewart v. United States Tr. (In re Stewart)*, 175 F.3d 796, 812 (10th Cir. 1999); *Sacred Heart Hosp. of Norristown v. Pa. (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 245 (3d Cir. 1998); *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989).

²⁴³ See, e.g., *Blanchard v. Ross (In re Ross)*, Nos. 97-19956DWS, 98-0246, 1999 WL 10019, at *6 (Bankr. E.D. Pa. Jan. 4, 1999) (“[T]he price of the fresh start is full disclosure”); *In re Jeffrey*, 176 B.R. 4, 6 (Bankr. D. Mass. 1994) (“A Chapter 7 case involves a *quid pro quo*: debtors receive a discharge and, in exchange, make full disclosure about their financial affairs. . . .”); see generally Gaumer & Nail, *supra* note 188, at 526 (“A debtor who files a voluntary bankruptcy assumes the responsibility of producing records that relate to her prepetition financial affairs.”).